Supreme Court, U.S.
FILED

051198 MAR 17 2006

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LINDA EKSTROM STANLEY,
ELLEN B. VERGOS, PETITIONERS

v.

DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOWARD MOORE, JR
Moore and Moore
445 Bellevue, 2d floor.
Oakland, CA 94610-4924
510-451-0104

ELLEN B. VERGOS
Counsel of Record
Martin, Tate, Morrow &
Marston, P.C.
Suite 1000
6410 Poplar Ave
Memphis, Tennessee 38119
901-522-9000

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

QUESTIONS PRESENTED

I. Whether the Attorney General has the power to remove employees solely due to change in presidential administrations without notice and hearing and without complying with the Civil Service Due Process Amendments of 1990, 5 U.S.C. 7511, et seq.

II. Whether 28 U.S.C. 581, the statute governing the appointment, term of office and removal of the U.S. Trustee, is a statute excepting the U.S. Trustee position from the competitive service within the meaning of the Civil Service Due Process Amendments, 5 U.S.C. 7511(b)(2)(C).

III. Whether the Attorney General has the power to remove, without cause, quasi-judicial officers who are appointed to serve a fixed statutory term prior to expiration of their terms without regard to the separation of powers principles articulated by this Court in Humphrey's Executor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 30

APPENDIX

Decision of the United States Court of Appeals for the Federal Circuit 1a

MSPB Opinion (Vergos) 9a

MSPB Opinion (Stanley) 12a

Order of the United States Court of Appeals for the Federal Circuit denying Rehearing (Stanley) 15a

Order of the United States Court of Appeals for the Federal Circuit denying Rehearing (Vergos) 17a

MSPB Initial Decision (Stanley) 19a

MSPB Initial Decision (Vergos) 42a

Relevant Provisions Involved.....50a

TABLE OF AUTHORITIES

Page

CASES

AMENDOLA V. DEPARTMENT OF HEALTH & HUMAN SERVICES, 989 F.2D 1180, 1182 (FED. CIR. 1993).....16

BALSER V. UST, 327 F. 3D 903 (9TH CIR. 2003), CERT. DENIED, 124 S.CT. 2159 (2004).....19, 20

COLE V. YOUNG, 351 U.S. 536, 546 (1956).....25

COOPER INDUSTRIES, INC. V. AVIALL SERVICES, INC., 125 S. CT. 577, 584 (2004).....30

DEP'T OF THE NAVY V. EGAN, 484 U.S. 518 (1988).....25

EX PARTE HENNEN, 38 U.S. (13 PET.) 230, 259 (1839)9

GOSNELL V. MSPB, 69 F.3D 1138 (FED CIR. 1995)..... 6, 13, 18

HENNEN, 38 U.S. (13 PET.) 230, 259 (1839).....9

HUMPHREY'S EX'R V. UNITED STATES, 295 U.S. 602 (1935)...23

IN RE CASTILLO, 297 F.3D 940, 950 (9TH CIR. 2002).....19

IN RE REVCO D.S., INC., 898 F.2D 498, 500 (6TH CIR. 1990) .19

JOELSON V. U.S., 86 F.3D 1413 (6TH CIR. 1996).....19

KING V. BRIGGS, 83 F.3D 1384 (FED. CIR. 1996).....6, 13

LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT, 507 U.S. 163, 168 (1993).....15

MYERS V. UNITED STATES, 272 U.S. 52 (1926) 21, 22

PARSONS V. UNITED STATES, 167 U.S. 324 (1897) 6, 20

RICHMAN V. STRALEY, 48 F.3D 1139 (10TH CIR. 1995) 19

STANLEY V. DEP'T OF JUSTICE, 2002 WESTLAW 31966394 1

THOMPSON V. DOJ, 61 M.S.P.R. 364 (1994), AFF'D, 106 F.3D 426 (FED. CIR.1997) 11

TODD V. MSPB, 55 F.3D 1574 (FED. CIR. 1995) 6, 13

UNITED STATES V. FAUSTO, 484 U.S. 439 (1988) 29

UNITED STATES V. PERKINS,116 U.S. 483 (1886) 21

VAN WERSCH V. DEP'T OF HEALTH & HUMAN SERVICES, 197 F.3D 1144 (FED. CIR. 1999) 6, 13

VERGOS V. DEP'T OF JUSTICE, 2003 WESTLAW 21417091 1

WIENER V. UNITED STATES, 357 U.S. 349 (1958) 23, 24

WINDSOR V. UNITED STATES DEPARTMENT OF JUSTICE, 746 F.2D 6 (6TH CIR. 1984) 18

STATUTES

5 USC 2101 27

5 USC 2102 27

5 USC 2102(a) 27

5 USC 7511 ..... *passim*

5 USC 7511(a) 11

5 USC 7511(a)(1)(C) 10, 16

5 USC 7511(b) 12

5 USC 7511(b)(2)(C) ..... *passim*

5 USC 7512 ..... 13, 14, 15, 16

5 U.S.C 7701(a) 3, 7

5 USC 7703 7

5 USC 7703(a)(1) 7

20 USC 241(a) 13

28 USC 536 27

28 USC 542(c) 15, 18

28 USC 581 ..... *passim*

28 USC 581(b) ..... *passim*

28 USC 581(c) ..... *passim*

28 USC 586(a) 19

28 USC 589 ..... 17, 27

28 USC 594 27

28 USC 1254(1) 1

29 USC 783(a)(1) 14

BANKRUPTCY JUDGES, UNITED STATES TRUSTEES, AND FAMILY FARMER BANKRUPTCY ACT OF 1986, PUB.L. NO. 99-554, 100 STAT. 3088 (1986) 9

H.R. CONF. REP. 99-958, H.R. Conf. Rep. No. 958, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5246, 1986 WL 32627 ..... 10, 17

H.R. REP. 101-328, H.R. Rep. No. 328, 101ST Cong., 1ST Sess. 1989, 1990 U.S.C.C.A.N. 695, 1989 WL 225002 ..... 8, 10

H.Rep. No. 595, 95th Cong. 88-99, 2d Sess. 404, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6049-60 9

OTHER AUTHORITIES

ROBERT G. VAUGHN, FEDERAL EMPLOYMENT DECISIONS OF THE FEDERAL CIRCUIT, 36 AM. U.L.REV. 825, 859 (1987). 7

WALTER DELLINGER, THE CONSTITUTIONAL SEPARATION OF POWERS BETWEEN THE PRESIDENT AND CONGRESS, 63 SPG LAW & CONTEMP. PROBLEMS 513, 556 (WINTER/SPRING 2000). 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (1a-6a) is published at 423 F.3d 1271. The initial decision of the administrative judge in Petitioner Stanley's case granting respondent's motion to dismiss (19a-41a), dated December 16, 2002, is unpublished and reported at 2002 Westlaw 31966394. The decision of the Merit Systems Protection Board affirming the initial decision is unpublished (12a-14a) and cited as Stanley v. Dep't of Justice, SF-0752-02-0591-I-1 (MSPB Mar. 18, 2004). The initial decision of the administrative judge in Petitioner Vergos' case granting respondent's motion to dismiss (42a-48a), dated June 6, 2003, is unpublished and reported at 2003 Westlaw 21417091. The decision of the Merit Systems Protection Board affirming the initial decision is unpublished (9a-11a) and cited as Vergos v. Dep't of Justice, AT-0752-03-0372-I-1 (MSPB July 1, 2004).

JURISDICTION

Judgment of the United States Court of Appeals for the Federal Circuit was entered on September 9, 2005, (1a-6a) and the order denying panel rehearing and rehearing *en banc* issued on November 17, 2005. (15a-16a [Stanley] and 17a-18a [Vergos]). Upon Petitioners' application, the time for filing the petition for certiorari was extended to March 17, 2006. This Court has jurisdiction pursuant to 28 USC 1254(1).

RELEVANT PROVISIONS INVOLVED

The key relevant statutes are the Civil Service Due Process Amendments of 1990, 5 USC 7511-7514, in Pet. App. 50a-54a, and 28 USC 581, in Pet. App. 57a-59a.

STATEMENT

Petitioners allege that the Department of Justice ("DOJ") violated their rights to due process under the Civil Service Due Process Amendments of 1990, 5 USC 7511, *et*

seq.,[1] ("1990 DPA") when then Attorney General ("AG") Ashcroft removed them from office, without cause and without due process, prior to the expiration of their respective statutory terms of office under 28 USC 581(b).[2] The United States Court of Appeals for the Federal Circuit ("CAFC") affirmed the judgments of the Merit Systems Protection Board ("MSPB") dismissing their respective appeals for lack of jurisdiction.

Petitioners submit that CAFC case law on the dispositive issue of subject matter jurisdiction of federal employee appeals is unclear and inconsistent and ask this Court to grant certiorari to provide direction and clarity on the analytical framework used to determine this important issue. Federal employees are entitled to clear guidance as to applicable law governing their legal rights under the 1990 DPA.

Proceedings below

Petitioners, United States Trustees ("USTs") were each removed from office, without cause and without due process of law, before the expiration of their terms of office, by then AG Ashcroft in 2002 (Stanley) and 2003 (Vergos). They appealed their removals to the MSPB under the jurisdiction of the 1990 DPA. An "employee" entitled to appeal a removal from office is defined in the 1990 DPA to include "employees in the excepted service (other than a preference eligible)...who has completed 2 years of current continuous service in the same or similar positions in an Executive agency...."[3] Petitioners met the requirements of that definition. They sought an award of back pay and benefits for the unexpired portions of their terms, interest, attorneys' fees, costs and additional relief.

---

[1] The 1990 DPA are set forth in Pet. App. 50a-54a.

[2] The statutes governing the office of the UST are set forth in Pet. App. 57a-66a.

[3] 5 USC 7511(a)(1)(C)(ii). (Pet. App. 50a).

The DOJ moved to dismiss for lack of jurisdiction, arguing that Petitioners were excluded from the definition of "employee" by an exception in the 1990 DPA at 5 USC 7511(b)(2)(C) (Pet. App. 51a) because former AG Reno proclaimed the USTs to be in a position of "confidential, policy-determining, policy-making or policy-advocating" character and because their position was "excepted from the competitive service by statute." The statute cited was 28 USC 581, the statute authorizing the appointment, term of office and removal of the UST. (Pet. App.57a-59a).

Both administrative judges, without factual hearings, dismissed Petitioners' respective appeals (Pet. App. 19a-41a, 42a-48a); each petitioner timely appealed to the MSPB; and the MSPB summarily affirmed the decisions of each administrative judge (Pet. App. 15a-15b, 16a-16b). Each Petitioner timely appealed to the CAFC where the decisions of the MSPB were affirmed in a single opinion. (Pet. App 1a-6a).

Statement of the case

Petitioners are lawyers appointed to two successive five-year terms as USTs in the DOJ by former AG Janet Reno. Both were removed from office, without cause and without due process, after eight years of continuous service, approximately two years before the expiration of their second terms of office by former AG John Ashcroft due to a "change in presidential administrations." (Pet. App 3a). The removals did not take place until June, 2002 (Stanley) and January, 2003 (Vergos) long after the new administration had taken office. No other USTs were removed before the expiration of their terms of office.

The DOJ did not comply with the due process procedures set forth in the 1990 DPA. As employees in the excepted service with more than two years of current continuous service, Petitioners were entitled to due process and appeal rights.[4]

---

[4] 5 U.S.C 7701(a) (Pet. App. 54a-55a); and 7513. (Pet. App. 53a)

This petition presents the legal question of whether the MSPB has jurisdiction over the appeal of a UST removed from office, without due process, and without regard to the statutory term of the UST.[5] As in each case involving the scope of jurisdiction of the 1990 DPA, the resolution of the jurisdictional issue depends upon the statutory construction of the jurisdictional statute and of the statute authorizing and governing the employment of the aggrieved employee. The two statutes to be analyzed in this case are the 1990 DPA and 28 USC 581 providing for the appointment, removal and term of office for USTs.

The jurisdictional statute at issue is 5 USC 7511, *et seq*. (Pet. App. 50a, et seq.) It is a part of the 1990 DPA and defines an "employee" entitled to appeal a removal from office in subsection (a). It is an undisputed fact that Petitioners were employees with appeal rights under 5 USC 7511(a)(1)(C)(ii). (Pet. App. 2a). An employee in the excepted service entitled to due process and appeal rights is defined by 5 USC 7511(a)(1)(C)(ii) to mean an employee who has completed two years of current continuous service in the same or similar position in an executive agency under other than a temporary appointment limited to two years or less. Petitioners met the statutory definition of "employee."

The disputed issue is whether the position of UST was placed in the excepted service by statute so as to exclude the position from the protections of the 1990 DPA. The exclusions from the definition of employee are in subsection (b) of 5 USC 7511. Pursuant to 5 USC 7511(b)(2)(C), the head of an agency such as the AG may determine a position to be of "confidential, policy-determining, policy-making, or policy-advocating" character if the position is excepted from the competitive service by statute. AG Reno, in 1996, proclaimed the position of UST to be of the character described. The DOJ, the MSPB and the CAFC contend that 28 USC 581(c), providing that the AG may remove a UST, is

---

[5] The term of office is set forth in 28 USC 581(b). (Pet. App. 59a)

the statute which excepts the position of UST from the competitive service so as to exclude the UST from jurisdiction under the 1990 DPA. The plain language of the statute does not support that construction.

Section 581(c) is completely silent on whether the position of UST is excepted from the competitive service. Petitioners do not deny that USTs are in the excepted service, but deny that they are placed in the excepted service by statute. The MSPB wrongly read language into 28 USC 581(c) to construe it as a statute placing the UST in the excepted service by implication. The CAFC affirmed, and the effect of its ruling clearly denied or took away the due process and appeal rights to which Petitioners were entitled and left them without any remedy to challenge their removal from office for clearly political reasons.

The CAFC decision affects not only Petitioners, but the status of quasi-judicial officers, who are duty bound to perform the duties of their office without even the appearance of partiality. The decision converts a non-political office to a political one against the legislative intent expressed by Congress[6] and allows the AG to disregard statutory limitations.

The statute providing for the appointment, removal and term of office for the UST is 28 USC 581. The plain language of the operative statute, 28 USC 581(c)(authorizing AG to remove a UST from office), as limited by 28 USC 581(b)(setting a five-year term for the UST) and the 1990 DPA (conferring appeal jurisdiction to appeal after two years of service), is clear and unambiguous. The CAFC's resort to and reliance on silent legislative history to confer authority on the AG that Congress did not give the AG was improper and contrary to prevailing decisional law. The legislative history expressed by Congress supports Petitioners' contentions and is discussed herein.

The CAFC's approach to statutory construction in Petitioners' case conflicts with the approach the same court

---

[6] See, legislative history quoted and discussed in Section I.B., *infra*.

uses in other federal employment decisions.[7] The CAFC neither cites, distinguishes nor reconciles these other CAFC cases.

The CAFC totally disregarded the five-year statutory term for USTs in 28 USC 581(b) by wrongly construing the term as a "cap" and citing inapposite case law pertaining to other types of employees in other circumstances and ignoring decisions of this Court, such as *Humphrey's Executor v. United States*[8] and of the D.C. Circuit *in United States v. Wilson.*[9]

Approving the truncating of Petitioners' terms of office, the CAFC simply stated "inferior officers may be removed before the end of their statutorily defined term" (6a) and failed to mention or distinguish the precedent of *Humphrey's Executor, supra,* holding a statutory term of office to constitute a limitation upon the power of an executive branch officer, such as the AG, to remove a quasi-judicial employee, such as a UST. Instead, the CAFC cites *Parsons v. United States,*[10] involving *presidential* removal power over a *presidential* appointee (U.S. Attorney), as opposed to the more limited power of the head of a department, such as the AG, to remove a quasi-judicial employee from office.

This precedential published holding of the CAFC, if left to stand, leaves a legacy of confusion as to the appropriate standards to apply to determine the existence and scope of MSPB jurisdiction over the appeals and rights of federal employees. Aggrieved employees, many of whom cannot

---

[7] See, e.g., *Todd v. MSPB*, 55 F.3d 1574 (Fed. Cir. 1995); *Gosnell v. MSPB*, 69 F.3d 1138 (Fed Cir. 1995); *King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996) and *Van Wersch v. Dep't of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999).

[8] 295 U.S. 602 (1935)("*Humphrey's Executor*")

[9] 351 U.S. App. D.C. 261, 290 F.3d 347, 2002 U.S. App. LEXIS 8907, 82 Empl. Prac. Dec. (CCH) P41062 (2002), *cert. denied*, 527 U.S. 1028 (2002). (construing "term of office.")

[10] 167 U.S. 324 (1897) (Pet. App. 6a)

afford legal counsel and years of protracted litigation from the administrative level through the appellate level, should not be left to guess as to the existence of processes to determine the rights Congress legislated for them.

REASONS FOR GRANTING THE PETITION

I. The CAFC's Denial Of Subject Matter Jurisdiction Over Federal Employees' Appeal Of An Adverse Employment Action Violates The 1990 DPA, Conflicts With And Does Not Reconcile Other Federal Employment Decisions And The CAFC And Is Wrong On The Merits.

A. CAFC case law is dispositive of the rights of thousands of federal employees and must offer clear guidance with articulated legal standards consistent with the case law of this Court and other CAFC cases.

The CAFC has sole jurisdiction of appeals from the MSPB and plays a very significant role in the development of federal employment law.[11] The law of the CAFC controls not only the hundreds of employee appeals filed annually in that court, but its decisions are dispositive of the thousands of employee appeals to the MSPB.[12] In the past five years, 2254 of the 7921 appeals to the CAFC were from decisions of the

---

[11] 5 USC 7703 (Pet. App. 55a-57a). *See* Robert G. Vaughn, *Federal Employment decisions of the Federal Circuit*, 36 AM. U.L.REV. 825, 859 (1987).

[12] The MSPB has jurisdiction over appeals of an "employee" from "any action appealable to the Board under any law, rule, or regulation." 5 USC 7701(a). (Pet. App. 54a-55a). The term "employee" is defined in 5 USC 7511(a) and exclusions are in 5 USC 7511(b). (Pet. App. 50a-52a). Adverse actions are set forth in 5 USC 7512 (Pet. App. 52a-53a) and include "removal." Any employee adversely affected or aggrieved by a final order or decision of the MSPB may obtain judicial review of the order or decision" in the CAFC. 5 USC 7703(a)(1), (b)(1),(Pet. App. 55a-56a).

MSPB and, of those appeals, the CAFC reversed the MSPB only 89 times.[13]

The MSPB statement to Congress at the hearings to enact the 1990 DPA, the statute governing Petitioners' right to appeal, is reflective of the sheer numbers of federal employees affected by the decisions of the MSPB and the CAFC. According to the MSPB, citing the Office of Personnel Management[14] ("OPM") between 1.5 and 1.8 million employees were covered by the CSRA before the enactment of the 1990 DPA. Over the five years preceding the amendment, the MSPB averaged approximately 3,700 initial appeals each year and petitions for review were filed with the MSPB in approximately 20 percent of the cases. The MSPB, again citing OPM, estimated the expansion of jurisdiction under the1990 DPA would cover between 20,000 to 300,000 employees generating 400 to 750 additional initial appeals and 90 to 150 additional petitions for review.[15]

This appeal process may be an employee's sole remedy to redress a denial of due process by an executive branch agency.[16] Because the decisions of the CAFC constitute precedent in the important area of the due process rights of federal employees, it is crucial that the decisions be crystal clear and consistent so federal employees know the extent and limits of their rights as enacted by Congress and interpreted by the courts.

The CAFC decisions should be consistent and clear on the issue of jurisdiction. They are not. The cases are confusing and conflicting. The CAFC applies different standards of statutory construction when reviewing the jurisdictional statutes in conjunction with the particular statute under which

---

[13] See the statistics on the court's website at http://www.fedcir.gov.

[14] The Office of Personnel Management is referred to as "OPM."

[15] H.R. REP. 101-328, H.R. Rep. No. 328, 101ST Cong., 1ST Sess. 1989, 1990 U.S.C.C.A.N. 695, 1989 WL 225002 (Leg.Hist.)

[16] The issue of the exclusivity of the remedies under the Civil Service Reform Act is before this Court in the case of *Whitman v. Department of Transportation, et al, 04-1131, on appeal from the Ninth Circuit.*

the appealing employee was appointed or employed. In Petitioners' case, the CAFC fails to distinguish the precedent of this Court, and of its own precedents. The disarray in CAFC opinions results in uncertainty as to the law controlling employee appeals from adverse actions taken by federal agencies. Resolution of the jurisdictional issue is outcome determinative in most cases.

B. CAFC decisions construing the 1990 DPA in conjunction with the statutes governing employment of the employee seeking relief are inconsistent and irreconcilable, leaving no clearly defined standards to determine jurisdiction in federal personnel law.

This case involves the scope and extent of the power of the executive branch to remove officers of the United States, the topic of the first great constitutional debate in the First Congress.[17] While this Court recognizes a general principle that "the power of removal [is] incident to the power of appointment,"[18] this Court's subsequent decisions recognize congressional restrictions on executive removal powers. The removal power at issue in the present case is that of the AG, i.e., the "head of an agency" over a UST.

The office of the UST was created by The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub.L. No. 99-554, 100 Stat. 3088 (1986). Congress concluded that the bankruptcy system did not work well and created the appearance of bias.[19] In the 1986 legislation, Congress authorized the AG to appoint and remove USTs, set a term of office for USTs, and specified

---

[17] See generally Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 SPG Law & Contemp. Problems 513, 556 (Winter/Spring 2000). The article is dated May 7, 1996 when Dellinger was Assistant AG and characterized as a "memorandum for the general counsels of the federal government."

[18] Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[19] *See* H.Rep. No. 595, 95th Cong. 88-99, 2d Sess. 404, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6049-60.

UST duties.[20] In the same legislation, Congress authorized the UST to employ staff and other personnel and provided for a temporary exemption from competitive service for the employees.[21] Congress did not provide for a similar statutory exemption from competitive service for USTs. Under 28 USC 581(c), Congress authorized the AG to remove USTs and gave the AG similar removal power over assistant USTs in 28 USC 582(c). (Pet. App. 59a). Congress limited the removal power of the AG over USTs by providing a five-year term of office in 28 USC 581(b). (Pet. App. 59a). The purpose of establishing the five-year term was to keep the office from becoming politicized. As stated in the legislative history:

> The section also sets the term of office of the U.S. Trustee at five years. This will help keep the Program from becoming politicized. If the term of office was four years, a U.S. Trustee's term of office could parallel a president's term in office, creating the appearance of making the U.S. Trustee a political appointment. Testimony at hearings indicated that persons qualified to serve as U.S. Trustee might not apply for positions if there were political overtones to the position.[22]

Four years later, Congress further limited the AG's removal power when it enacted the 1990 DPA "to extend to certain employees in the excepted service who are not preference eligible the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service."[23] This legislation included 5 USC 7511(a)(1)(C) expanding the definition of an "employee" entitled to appeal

---

[20] 28 USC 581 and 586. (Pet. App. 57a-59a).

[21] 28 USC 589 (1986 version). (Pet. App. 65a-66a).

[22] H.R. CONF. REP. 99-958, H.R. Conf. Rep. No. 958, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5246, 1986 WL 32627 (Leg.Hist.)

[23] H.R. REP. 101-328, H.R. Rep. No. 328, 101ST Cong., 1ST Sess. 1989, 1990 U.S.C.C.A.N. 695, 1989 WL 225002 (Leg.Hist.) "Purpose."

an adverse employment action to include "(C) an individual in the excepted service (other than a preference eligible)- "(ii) who has completed 2 years of current continuous service in the same or similar position in an Executive agency under other than a temporary appointment limited to 2 years or less." Once the time in service requirement of two years is met, a UST during his or her term of office is included within the employee definition.[24] It is undisputed that when Petitioners were appointed to office in 1994 and 1995, respectively, they qualified as "employees" under 5 USC 7511(a). (Pet. App. 2a).

Decision below

The DOJ contended, and the CAFC agreed, that Petitioners lost their status as "employees" when, in 1996, then AG Janet Reno proclaimed Petitioners' position to be "confidential, policy-determining, policy-making, or policy-advocating" and "exempted from the civil service due process requirements set forth in Title 5 of the United States Code." (Pet. App. 2a-3a). The DOJ and CAFC concluded that this proclamation effectively excluded USTs from appeal rights under 5 USC 7511(b)(2)(C). That section excludes those employees whose agency heads determine their positions to be of the character described in Reno's proclamation. The head of an agency can make that determination but only for a position already excepted from competitive service *by statute*, as opposed to a position excepted by regulation, by OPM, or by some other method.

The CAFC opinion reflected a misunderstanding of Petitioners' positions when it mischaracterized them as follows: "On appeal, Petitioners challenge the Administrative Judge's determination that they occupied positions in the excepted service and, further, assert that Congress mandated that Trustees serve the full five-year term established in

---

[24] *Thompson v. DOJ*, 61 M.S.P.R. 364 (1994), *aff'd*, 106 F.3d 426 (Fed. Cir.1997)(holding that a UST removed from office prior to the end of her term in office was entitled to appeal under the 1990 DPA).

section 581(b)." (Pet. App. 3a). The Court concluded: "Because the board did not err in holding that USTs are excepted from the competitive service and, therefore, not entitled to appeal to the board, we affirm."(Pet. App. 2a).

Petitioners never contended they were in the competitive service as suggested by the court, nor did Petitioners contend that Congress mandated that USTs serve the full five-year term established in section 581(b). To the contrary, Petitioners acknowledge they were in the excepted service, but contend they were not in the excepted service by statute. Further, Petitioners never argued the five-year term is mandatory, but contended the AG's removal power is limited once the UST has completed the two years of service necessary to establish appellate rights under 5 USC 7511(b). After two years, the statutory term in 28 USC 581(b) limits the AG's discretion to remove a UST without due process, but does not limit the AG's authority to dismiss a UST for cause if due process is given. Because the CAFC failed to understand Petitioners' contentions and wrote an opinion ruling on the mischaracterized contentions, the CAFC opinion results in confusion.

The CAFC agreed with DOJ that USTs were excepted from competitive service by statute, citing 28 USC 581(c), but CAFC reached this conclusion by a convoluted rationale disregarding this Court's case law and CAFC case law on statutory construction. Without looking at the plain language of the statute, without finding the statute to be ambiguous and without citing any of the legislative history of either statute at issue, the CAFC cited a previous version of 28 USC 581(c), pertaining to an early UST pilot program and noted the words "for cause" were removed from the statute. (Pet. App. 4a).

Next, the CAFC ignored the 1990 DPA and concluded "the AG need not show cause before removing a Trustee" and stated, wrongly, "that Trustees may be removed without cause is a clear indication that they are excepted from the competitive service as required by section 7511(b)(2)(C)." (Pet. App. 5a). Finally, the CAFC attempted to buttress its

position by incorrectly noting Petitioners' "personnel forms specifically said that their appointments were excepted pursuant to section 581..." and pointed out Petitioners were appointed without a competitive examination, the "touchstone of the competitive service." (Pet. App. 5a). It is true Petitioners were appointed without a competitive examination, but that fact is irrelevant and immaterial to a determination of jurisdiction under the 1990 DPA since employees in the excepted service are included in the grant of jurisdiction.

C. The analytical approach used by the CAFC in Petitioners' case differs from the approach used by the CAFC in other cases and cannot be reconciled.

The CAFC's analysis of Petitioners' case differs markedly from the analyses of the CAFC considering similar legal issues. Anyone reviewing the analytical approaches the CAFC used in four other reported federal employment cases[25] would not predict the reasoning and result. In all four cases, federal employees sought to appeal adverse employment actions of the MSPB under the DPA with a variety of results. None of the four cases is cited, distinguished or even mentioned in the decision in Petitioners' case.

In *Todd, supra,* the employee was employed by a federal agency under a statute specifically and expressly giving the agency the option to employ personnel without the protections provided by 5 USC 7511, 7512 and other civil service statutes.[26] After the employee was hired, the 1990 DPA were enacted. The employee attempted to appeal a new pay policy as an adverse action under 5 USC 7512. The agency moved to dismiss the appeal since the employee was

---

[25] *Todd v. Merit Systems Protection Board,* 55 F.3d 1574 (Fed. Cir. 1995)("*Todd*"); *Gosnell v. Merit Systems Protection Board,* 69 F.3d 1138 (Fed Cir. 1995)("*Gosnell*"); *King v. Briggs,* 83 F.3d 1384 (Fed. Cir. 1996)("*Briggs*"); and *Van Wersch v. Dep't of Health & Human Services,* 197 F.3d 1144 (Fed. Cir. 1999)(" *Van Wersch)*

[26] *Briggs*, citing *Todd* at 1577, quoting 20 USC 241(a), the statute under which Ms. Todd was appointed.

hired under a statute specifically denying her appeal rights even if she fell within the new definition of employee. The CAFC noted the conflict between the earlier employing statute "dealing with a narrow, precise, and specific subject" and the "later enacted [1990 DPA] covering a more generalized spectrum" and concluded the 1990 DPA did not repeal the employing statute by implication. Judge Mayer, writing for the CAFC, held the MSPB lacked jurisdiction over the appeal and found the statutory language clearly meant to exclude the employee from appeal rights since the jurisdictional statute was specifically mentioned. The language governing the employment of USTs contains no such exclusion of appeal rights, specific or otherwise.

In *Briggs*, *supra*, decided less than a year after *Todd*, the CAFC used the analytical framework in *Todd* with a different result. The distinction lies in the specific language used in each appointing statute. The employee in *Briggs* was appointed under a statute predating the 1990 DPA. The appointing statute[27] authorized her appointment "without regard to the provisions of Title 5 governing appointments in the competitive service...of such title relating to classification and General Schedule pay rates." Although the appointing statute mentioned Title 5, the exclusion was general and, unlike the appointing statute in *Todd*, did not specifically exclude Ms. Briggs' position from appellate rights. Judge Michel, writing for the court, concluded she could appeal her removal.

The CAFC in *Briggs*, *quoting* from *Todd*, recognized the 1990 DPA reflect a general rule that "excepted service employees with two years of continuous service have appeal rights" and appeared to require that any exception to the general rule be explicit and specific for an agency to deny the appeal rights to a narrow category of personnel.[28]

---

[27] 29 USC 783(a)(1)(Pet. App.69a).

[28] *Briggs* at 1388.

The *Briggs* court refused to read language into the appointing statute and aptly pointed out that "as *Todd* amply demonstrates, Congress knows how to exempt a civil service position from the protections found in chapters 75 and 77 of title 5 if it so desires."[29] The *Briggs* Court declined to use other sources, such as regulations or legislative history, or the implementing regulations of OPM to interpret the jurisdictional statute or the appointing statute because there was no ambiguity.

Judge Plager, in the concurring opinion in *Briggs*, stated the narrow question in *Briggs* to be "whether the language creating Ms. Briggs' position is sufficiently precise as to exempt it from the inclusion effect of the 1990 amendment." Distinguishing *Briggs* from *Todd*, he noted that "the language [in *Todd*] was clear enough for this court to hold that the position was included. In [the *Briggs*] case, the language is less clear." Judge Plager described the *Briggs* decision as holding that "absent clear language in the statute that created the position, the general sweep of the 1990 amendments should prevail." Id.

In *Gosnell, supra*, the CAFC reviewed an appeal by an assistant United States Attorney of a reassignment from a supervisory position. The CAFC held the reassignment was not an appealable adverse action under 5 USC 7512 but, in *dicta*, the CAFC indicated the 1990 DPA gave specific excepted service employees, including assistant U.S. attorneys, the right to appeal adverse personnel actions despite the language of 28 USC 542(c)(Pet. App. 68a) which, like 28 USC 581(c), does not contain "for cause" language and gives the AG the broad power to remove assistant U.S. attorneys. In a *per curiam* decision, the CAFC stated:

> Before Congress enacted the Due Process Amendments, the agency instituted removal actions against assistant U.S. attorneys only for good cause

---

[29] *King v Briggs* at 1388, citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

> and the actions were taken pursuant to agency procedures. 1988 U.S. Attorneys' Manual 99. Since the Due Process Amendments became law, assistant U.S. attorneys have had the right to appeal removal actions, as well as other actions listed in 5 USC 7512, to the Merit Systems Protection Board. 69 F.3d at 1140.

The appointing statute for USTs, USC 581(c), has identical removal language ("subject to removal by the Attorney General") (Pet. App. 59a) as the appointing statute for assistant U.S. Attorneys. In *Gosnell,* this language was regarded by the CAFC as having been limited by the new rights of excepted service employees under the 1990 DPA.

In a fourth CAFC case determining an employee's right to appeal under the 1990 DPA, the CAFC applied well-known principles of statutory construction in finding for the employee. In *Van Wersch, supra,* the CAFC parsed the statutory language of 5 USC 7511(a)(1)(C), defining "employee" and applied the clear unambiguous statutory language, even though there was express legislative history to the contrary. When confronted with the choice between the plain language of 7511(a)(1)(C), defining "employee," and conflicting legislative history supporting the opposite conclusion, the CAFC chose the plain language. The CAFC stated:

> [W]e are not prepared to allow the extant legislative history, which we have described above, to trump the irrefutably plain language that emerged when Congress actually took pen to paper. As we stated in *Amendola v. Department of Health & Human Services*, 989 F.2d 1180, 1182 (Fed. Cir. 1993), "[w]hen a statute expresses its purpose in short, clear terms, the duty of the court is to apply the statute as written. 197 F.3d at 1151.

The appointing statute at issue in Petitioners' case, 28 USC 581 (Pet. App. 57a-59a), does not mention competitive service, excepted service, due process or appeal rights. The statute simply states: "Each UST is subject to

removal by the AG" and provides for a five-year term of office in 581(b). The expressed legislative history of 28 USC 581 reflects the intent of Congress that the UST program not be politicized and is consistent with the plain language of the statute. In addition, the legislative history shows when Congress intends to enact a statute providing for the exception of a position from competitive service, it knows how to do so, because a part of the 1986 legislation included a statutory temporary exception for employees of the UST. (Pet. App. 65a-66a). The legislative history includes the following statement:

> Section 209(b) of the Senate bill amended 28 USC 589 to provide that staff employed by the United States trustee would be employed without regard to the provisions of title 5, governing appointments in the competitive service. The Conference Report includes this exemption, but limits its effect to the period ending October 1, 1989.
>
> The exemption from title 5 until October 1, 1989 is expected to assist United States trustees in the 'start-up' of the trustee program. Although the exemption is not permanent, the managers do not intend to prohibit the DOJ from requesting, or receiving, Office of Personnel Management approval of exemptions from title 5 on an annual basis if such exemption is otherwise appropriate--as is currently the practice.[30]

The above-quoted statement from the House Report is significant in two respects. The statement reflects intent to except employees of the UST from competitive service by statute, when no such exception was made by statute for the UST. Further, it indicates the practice of DOJ to exempt employees from competitive service by requesting or

---

[30] H.R. CONF. REP. 99-958, H.R. Conf. Rep. No. 958, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5246, 1986 WL 32627 (Leg.Hist.)

receiving annual approval of the exemptions from OPM rather than by statute.

Since the amendment of 581(c) took place in 1986, before non preference eligible excepted service employees had appeal rights under the 1990 DPA, the reason for the amendment could not have been to exclude USTs from appeal rights. More likely, the deletion of the "for cause" language amendment was made to conform with 28 USC 542(c), applicable to Assistant U.S. Attorneys, whose removal was held to be within the discretion of the AG[31] and not appealable, other than through agency procedures, before the enactment of the 1990 DPA .

The CAFC in Petitioners' case ignored plain language, legislative history and incorrectly cited Petitioners' personnel forms as showing their appointments were excepted pursuant to section 581.[32] Even if the CAFC were correct, a citation of the way in which executive agency personnel complete forms is ludicrous legal authority for a denial of jurisdiction.

D. The CAFC's decision denying Petitioners' rights to due process and appeal from an AG's orders removing them from office without cause in disregard of dual statutory limitations on the AG's removal power violates the separation of powers doctrine under this Court's decisions.

The CAFC must consider the nature of the office of the individual removed from office and the limitations Congress and the Constitution placed on the official exercising removal powers before allowing the AG's removal action, based on partisan politics, to stand. The CAFC opinion

---

[31] Compare *Windsor v. United States Department of Justice*, 746 F.2d 6 (6th Cir. 1984) with *Gosnell v. Department of Justice*, 69 F.3d 1138, 1140 (Fed. Cir. 1995).

[32] A cursory look at the form shows the only mention of 28 USC 581 is in the box denominated "Legal Authority." Neither form states the appointments were excepted pursuant to 581. Section 581 is the legal authority for the appointment (which is what the form appears to state), not the source of placement of the UST in the excepted service.

contains no discussion or evidence of consideration of legislative intent in setting up the office of UST, the duties of the office or the necessity of the office holder to exercise statutory duties free of political considerations. Instead, the CAFC incorrectly referred to Petitioners as "federal bankruptcy Trustees," declined to use the title of the office, made no analysis of the duties of the office holder and did not cite any of the considerable case law describing the nature of the office.

The UST is appointed by the AG and charged with supervising bankruptcy cases and trustees under Chapters 7, 11, and 13 of the Bankruptcy Code.[33] Congress specified that the USTs were to be independent of direct court supervision, as executives of the bankruptcy network.[34]

USTs perform many functions previously assigned to bankruptcy judges.[35] They have quasi-judicial duties including discretion to appoint and remove case trustees, without judicial review.[36] Based on the nature of their duties, the DOJ in another case has successfully argued that USTs have judicial immunity from liability in the performance of these duties.[37]

The designation of the UST as a quasi-judicial official is significant because this Court has long recognized an executive's ability to remove a quasi-judicial official is limited to the extent that Congress places limitations on the executive's power.[38] The limitations on President Roosevelt's power to remove a Federal Trade Commissioner in

---

[33] See 28 USC 586(a)(Pet. App. 59a-66a); *In re Castillo*, 297 F.3d 940, 950 (9th Cir. 2002).

[34] *See In re Revco D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990).

[35] *Balser v. UST*, 327 F. 3d 903 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2159 (2004).

[36] *Joelson v. U.S.*, 86 F.3d 1413 (6th Cir. 1996); *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995).

[37] *Balser, supra.*

[38] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). ("*Humphrey's Executor*")

Humphrey's Executor were similar to the limitations Congress placed on the AG's power to remove a UST in 28 USC 581(c). In *Humphrey's Executor*, Congress established a seven-year term of office for the commissioner. This Court did not allow the president to remove the quasi-judicial officer in derogation of the statutory limitations and emphasized the necessity for independence and freedom from political concerns on the part of quasi-judicial officials in the exercise of their duties.

Cases cited by the CAFC as authority to disregard the USTs' term of office do not apply to quasi-judicial officials with duties requiring independence and impartiality. The CAFC relied on case law applicable to political positions with a demonstrated need for political accountability to an administration in power. *Parsons v. United States*[39] involved the president's authority to remove a federal district attorney, appointed by the president for a four-year term. The law holding the term in that case to be a "cap" does not apply to a quasi-judicial appointee of the AG. The other case, *Pievsky v. Ridge*,[40] did not involve a federal employee but rather a commissioner appointed by a state governor to a five-year term pursuant to an interstate compact. The compact was neither a quasi legislative or quasi judicial body but rather a politically sensitive body that "must be responsive to the programs and policies of the administration presently in office"[41] for the [agency] "to function properly."[42]

On the contrary, USTs are quasi judicial officers who must act with impartiality in discharging their administrative duties.[43] No demonstrated need exists for political accountability to the administration in power for USTs to function properly. It was wrong for the AG to remove

---

[39] 167 U.S. 324 (1897)("*Parsons*")

[40] 98 F.3d 730, 734 (3d Cir.1996)("*Pievsky*").

[41] 98 F. 3d at 735.

[42] (*Ibid*, at 736).

[43] *Balser v. UST*, 327 F. 3d 903 (9th Cir. 2003).

Petitioners for the stated reason, "change of presidential administrations."

The CAFC neither cited nor distinguished this Court's primary cases defining the separation of powers with respect to removal of officers. The applicable cases are *United States v. Perkins*[44]; *Myers v. United States*;[45] 272 U.S. 52 (1926) ("*Myers*"); and *Humphrey's Executor v. United States, supra.*

The distinction between the treatment of the presidential appointees and appointees of a head of a department is the subject of *Perkins, supra,* an early Supreme Court case holding that Congress may restrict the removal power of the head of a department (such as the AG) under article 2 of the Constitution. *Perkins* concerned the power of the Secretary of the Navy to remove a cadet engineer. According to that case, Congressional limitations of the appointment and removal power of a head of a department (as opposed to the President) must be upheld. This Court stated:

> We have no doubt that, when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officer so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but also in all that is incident thereto. 116 U.S. at 485.

In *Myers*, this Court discussed the removal powers of an executive and again distinguished between presidential appointments and appointments by heads of departments. The

---

[44] 116 U.S. 483 (1886)("*Perkins*")

[45] 272 U.S. 52 (1926) ("*Myers*")

plaintiff, Myers, a postmaster, was appointed by the President, with the advice and consent of the Senate, for a term of four years. Three and one half years later, when a new president took office, Myers was removed from office by order of the postmaster general, acting by direction of the president. Myers sued to recover his salary from the date of his removal to the end of his term. This Court first looked to article 2 of the Constitution, the appointments clause, providing in pertinent part that the President:

> ...shall nominate, and by and with the Advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments. 272 U.S. at 108.

In *Myers*, the court upheld the removal powers by a *president* of *presidential* appointees.

A few years later, this Court, in *Humphrey's Executor*, considered the significance of the statutory term of office of a member of the Federal Trade Commission. This Court stated that even if the intent were not clear from the statute, the intent that the President's removal power is restricted is clear by "the character of the commission and the legislative history which accompanied and preceded the passage of the act."[46] This Court found significant that the commission was to be nonpartisan, act with entire impartiality, and, by the nature of its duties, was charged with the enforcement of no policy except the policy of the law; and that its duties were neither political nor executive, but predominantly quasi judicial and

---

[46] 295 U.S. at 624.

quasi legislative.[47] The same can be said for USTs.

Significantly, this Court in *Humphrey's* cited legislative history reflecting the congressional view that "a fixed term was necessary to the effective and fair administration of the law" and that the nature of the work of the commission made it "manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'" 295 U.S. 602 at 624.

This Court in *Humphrey's* concluded:

> The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.[48]

This Court, stressing the importance of the separation of powers, noted "the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."[49]

The holding in *Humphrey's Executor* was extended by this Court in *Wiener v. United States*, 357 U.S. 349 (1958)("*Wiener*"). In *Wiener*, this Court again held that the president himself could not remove a member of the War Claims Commission serving a fixed term solely due to a

---

[47] 295 U.S. at 624.

[48] 295 U.S. at 629.

[49] 295 U.S. at 629.

change in presidential administration. This Court implied a "for cause" limitation, even though none existed in the employing statute. Observing that Wiener was not removed for cause, but only because President Eisenhower wanted commission members of his "own selection," this Court explained:

> Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim. 357 U.S. at 356.

Similarly, the legislative history of the statute creating the office of the UST reflects a concern the office not be a political one. The term of office is five years so as not to be coextensive with the president's term of office; and the statute was structured so as to attract bankruptcy professionals to the office.[50]

E. CAFC's conclusion that then AG Reno's 1996 proclamation the position of UST was one of a "confidential, policy-making, policy-determining or policy-advocating character" was an unreviewable inherently discretionary judgment call was wrong on the merits and beside the point.

The question before CAFC was not whether AG Reno had the discretion to proclaim the position of UST to be of a "confidential, policy-making, policy-making or policy-advocating character." The question was whether the position

---

[50] *See* legislative history cited, *supra*, in I. B.

of UST was excepted from the competitive service by statute, subject to the exercise of the AG's discretion to proclaim the position one of a "confidential, policy-making, policy-determining or policy-advocating character." The CAFC's conclusion that AG Reno's "designation of the Trustee position is unreviewable" is clearly erroneous.

The CAFC relied on *Dep't of Navy v. Egan*[51] for this erroneous conclusion. The *Egan* case involved the unique issue of national security. The CAFC's conclusion in Petitioners' case, if allowed to stand, widens a very narrow holding relating to facts underlying the Navy's denial of a security clearance to almost any topic the head of an agency may choose to determine. Justice Blackmun, writing the opinion of this Court, limited the precedent to national security.

The narrow question in *Egan* was whether the MSPB has statutory authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. This Court granted certiorari because of the importance of the issue in its relation to national security concerns. This Court's analysis in *Egan* referred to the grant of security clearance to a particular employee, as a sensitive and inherently discretionary judgment call, committed by law to the appropriate agency of the Executive Branch of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.'"[52]

This Court pointed out the absence of express authority for the MSPB to review a denial of security clearance and the existence of a specific statute providing for agency review of the denial. The CAFC's extension of the executive power in *Egan* to Petitioners' case is absurd. Petitioners appealed their removals from office, an appealable

---

[51] 484 U.S. 527(1988)("*Egan*").

[52] *quoting, Cole v Young*, 351 U.S. 536, 546 (1956).

adverse action, unlike the denial of the security clearance in *Egan*. This holding misuses the authority of *Egan* to disregard the separation of powers by concluding that the head of an agency may make a declaration exempting a class of employees from the due process protections Congress provided with no avenue for judicial review.

II. The CAFC Improperly Used Non-Existent Legislative History To Thwart The Intent Of Congress Expressed In The Plain Language Of Unambiguous Statutes and Clearly Articulated Legislative History Leaving a Clearly Erroneous Precedent In Federal Employment Law.

A. The plain, unambiguous language of the statute authorizing the appointment, term of office and removal of USTs does not provide that the "position [of UST] is excepted from competitive service by statute" and does not provide a alternative procedure to the 1990 DPA for a lawful removal.

The CAFC's construction of 28 USC 581 in conjunction with 5 USC 7511(b)(2)(C) to deny Petitioners jurisdiction to appeal their removal is contrary to the law of this Court, to other cases in the CAFC, and to law in the D.C. Circuit concerning the principles of statutory construction. Numerous recent cases of this Court set forth principles for courts to use in construing statutes. CAFC case law includes cases enunciating these principles and carefully articulating and following them. The opinion in Petitioners' case neither cites nor distinguishes them.

To construe 28 USC 581(c) as a statute excepting the position of the UST from competitive service, the CAFC simply noted that the words "for cause" were deleted in 1986 from a previous version applicable to an early pilot program and improperly jumped to a conclusion conflicting with other statutes, express legislative history and case law. A finding that 581(c) does or does not except the position from competitive service is outcome determinative. If USTs are excepted from competitive service by statute, the exclusion

from the 1990 DPA in 5 USC 7511(b)(2)(C) applies; if USTs are excepted by regulation or some means other than by statute, the exclusion does not apply and jurisdiction to appeal exists.

Applicable law requires that to except an employee from competitive service, the exception must be specific and explicit. Competitive service is the rule and excepted service, an exception to that rule, must be *specifically* carved out.[53] For example, the "civil service," defined as all federal appointive positions except uniformed services under 5 USC 2101, is composed of the "competitive service," the "excepted service," and the "Senior Executive Service."[54] Most executive branch appointive positions not requiring Senate confirmation and not in the Senior Executive Service are in the competitive service unless "*specifically excepted* from the competitive service by or under statute." 5 USC 2102. (emphasis supplied)(Pet. App. 66a). Examples of statutes specifically excepting employees from competitive service are 28 USC 536 ("All positions in the Federal Bureau of Investigation are excepted from the competitive service,")(Pet. App. 68a); and 28 USC 594 (C):(employees of the office of independent counsel)(Pet. App. 68a-69a). Significantly, the 1986 version of 28 USC 589, governing employees of the UST, enacted in the same chapter as 28 USC 581, contained a temporary exception from competitive service. (Pet. App. 65a-66a). No such statute exists or ever existed for USTs.

B. *The CAFC's interpretation of the deletion of "for cause" language in 28 USC 581(c), authorizing the AG to remove UST's from office as a statute excepting the position from competitive service is inconsistent with the legislative history*

---

[53] 5 USC 2102(a). (Pet. App. 66a-67a).

[54] *See* 5 USC 2102(defining competitive service), 2103(defining excepted service). (Pet. App. 67a)

of the statute authorizing the appointment, term of office and removal of USTs and of the 1990 DPA .

The language of the 28 USC 581(c) is clear and unambiguous in its absence of the specific language required for an excepted service designation. In the absence of ambiguity, the CAFC in other cases disregards legislative history.[55] In Petitioners' case, CAFC relied only on the legislative history deleting the "for cause" language from an earlier version of the statute. (32a). Since the language was deleted four years before the enactment of the 1990 DPA , the deletion could not possibly have been to exempt U. S. Trustees from the protections of the 1990 DPA, yet such is the effect of the CAFC's conclusion.

The express legislative history of the 1986 amendment shows that the intent of Congress in enacting 28 USC 581(c) is inconsistent with the CAFC's conclusion. The legislative history, shows Congress intended the USTs to be protected and not politicized by the five-year term of office in 28 USC 581(b). Yet, in direct contradiction of that intent, the CAFC concludes that "reading section 581(b) as mandating a five-year term renders section 581(c) meaningless, a construction we will not adopt. If Congress had intended to eliminate the removal authority of the AG during the course of the five-year term, it would have deleted section 581(c) in its entirety." (6a). Petitioners submit that the reading of the statute by the CAFC renders meaningless the five-year term of office in 28 USC 581(b).

The CAFC's approach in construing the meaning of "term of office" conflicts with the approach of the D.C. Circuit in *United States v. Wilson*.[56] The D.C. Circuit emphasized that the executive branch must look to Congress "under its legislative power" to establish an office and for "[t]he determination of their functions and jurisdiction, the

---

[55] See, e.g., *Briggs, supra*; *Van Wersch, supra;* and discussion in section I. B., *supra.*

[56] *Supra*, fn.15.

prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and *the fixing of the term for which they are to be appointed* and their compensation—all except as otherwise provided by the constitution." (emphasis added). This is in accordance with article 2 of the Constitution, the appointments clause.

Petitioners urge this Court to grant certiorari to direct the CAFC to use this Court's and the CAFC's own articulated standards of statutory construction. In addition to the CAFC's employment cases of *Todd, Briggs, Gosnell* and *Van Wersch,* discussed, *supra,* the CAFC in the very recent case of *Motion Systems Corporation v. Bush et al., slip op.* (Fed. Cir. Feb. 10, 2006) ("*Motion Systems*") devoted pages of an opinion to construing statutory language of a statute to determine whether the President of the United States is an "officer" within the meaning of that statute. Under the principles of statutory construction in that case, the CAFC would have come to a difference conclusion in Petitioners' case.

Petitioners ask this Court to clarify the appropriate process for statutory construction for the MSPB and CFAC, the court of redress for thousands of federal employees. It is the process CFAC used in *Motion Systems*, not the haphazard process CFAC used to dismiss their case for lack of jurisdiction. Instead of focusing on 28 USC 581(c), the CAFC should have construed 5 USC 7511, *et seq.* and 28 USC 581 together. In *U.S. v. Fausto*[57] this Court spoke of the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assum[ing] that the implications of a statute may be altered by the implications of a later statute."

When the 1990 DPA are reconciled with 28 USC 581(c), as amended in 1986, only one interpretation is in keeping with this Court's "settled rule that [courts] must, if

---

[57] 484 U.S. 439, 452-53 (1988).

possible, construe a statute to give every word some operative effect."[58] That interpretation is as follows:

1. Congress placed two limitations on the AG's power to remove a UST from office:

a. the five-year term of office for the UST in 28 USC 581(b); and

b. the 1990 DPA, 5 USC 7511-7514, enacted four years after the "for cause" requirement was deleted from 28 USC 581(c).

2. Under 28 USC 581(c), the AG has discretion to remove a non-preference eligible UST, with or without cause, during the first two years of employment with the DOJ. In addition the AG has discretion to remove a UST, with or without cause, after the expiration of the term of office in 28 USC 581(b).

3. After two years of service *and* during the UST's five-year term of office, the UST is covered by the 1990 DPA under 5 USC 7511, *et seq.*

4. After the UST has completed the time in service required to fall within the protections of the 1990 DPA *and* during the UST's term of office, the AG may remove the UST, but only for cause and only with due process.

5. Upon completion of the UST's term or upon a showing of cause, the AG's power of removal in 28 USC 581(c) is absolute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLEN B. VERGOS
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Ave, Suite 1000
Memphis, Tennessee 38119
901-522-9000

---

[58] *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 125 S. Ct. 577, 584 (2004).

(any footnotes trail end of each document)

04-3298, 04-3427
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LINDA EKSTROM STANLEY,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

ELLEN B. VERGOS,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

COUNSEL: Howard Moore, Jr., Moore and Moore, of Oakland, California, argued for petitioner Linda Ekstrom Stanley in 04-3298.

Ellen B. Vergos, Apperson, Crump and Maxwell, P.L.C., of Memphis, Tennessee, argued pro se in 04-3427.

Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With him on the brief were Peter D. Keisler, Assistant Attorney General and David M.

Cohen, Director. Of counsel on the brief were Clifford J. White, III, Deputy Director, and Esther I. Estryn, Deputy General Counsel, Executive Office of United States Trustees, United States Department of Justice, of Washington, DC.

JUDGES: Before MAYER, RADER, and LINN, Circuit Judges. MAYER, Circuit Judge.

OPINION BY: MAYER

OPINION: MAYER, Circuit Judge.

Appellants, Linda Stanley and Ellen Vergos, appeal the decisions of the Merit Systems Protection Board, which dismissed their appeals for lack of jurisdiction. *Stanley v. Dep't of Justice*, 2004 MSPB LEXIS 491 , SF-0752-02-0591-I-1 (MSPB Mar. 18, 2004); *Vergos v. Dep't of Justice*, 2004 MSPB LEXIS 868, -0752-03-0372-I-1 (MSPB July 1, 2004).[1] Because the board did not err in holding that United States Trustees are excepted from the competitive service and, therefore, not entitled to appeal to the board, we affirm.

Background

Stanley and Vergos were appointed as the bankruptcy Trustees for Region 17 in 1994 and Region 8 in 1995, respectively. At the time of their appointments, they were covered by the protections contained in 5 U.S.C. §§ 7701(a)[2] and 7513[3] because they qualified as "employees" under 5 U.S.C. § 7511(a).[4] In 1996, however, Attorney General Janet Reno proclaimed that the position of Trustee is "confidential, policy-determining, policy-making, or policy-advocating [in]

character" and, as such, "exempted from the civil service due process requirements set forth in Title 5 of the United States Code." The Director of Trustees, Joseph Patchan, circulated a memo stating that Trustees appointed prior to the proclamation would not be affected--they would retain appeal rights--but that all those appointed after the proclamation were exempt from the due process provisions contained in Title 5.

Appellants served their initial five-year terms and each requested appointment to an additional five-year term. Both were reappointed by Attorney General Reno. Three years into their second terms, Attorney General John Ashcroft removed them because of the change in presidential administrations.

Stanley and Vergos appealed their removal to the board arguing that, because they were initially appointed before Attorney General Reno's proclamation, they were entitled to appeal rights. The board dismissed the cases for lack of jurisdiction because it determined that they were not "employees" pursuant to 5 U.S.C. § 7511(b). Specifically, the board found that the position of United States Trustee: (1) was classified as confidential and policy-making by the Attorney General; and (2) was excepted from the competitive service by 28 U.S.C. § 581(c). On appeal, appellants challenge the Administrative Judge's determination that they occupied positions in the excepted service and, further, assert that Congress mandated that Trustees serve the full five-year term established in section 581(b).

Discussion

The scope of the board's jurisdiction is a question of law

which we review without deference. *Kelley v. MSPB*, 241 F.3d 1368, 1369 (Fed. Cir. 2001); *Lourens v. MSPB*, 193 F.3d 1369, 1370 (Fed. Cir. 1999). The board's jurisdiction is limited; only "employees" or "applicants for employment" as defined in section 7511(a) may appeal - to the board. Section 7511(b), however, specifically excludes those employees "(2) whose positions have been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by--... (C) the President or the head of an agency for a position excepted from the competitive service by statute." Here, it is undisputed that Attorney General Reno's Order in 1996 determined that the position of Trustee was of a "confidential, policy-determining, policy-making or policy-advocating character." This designation of the Trustee position is unreviewable by the courts because it is an "inherently discretionary judgment call" committed to the Attorney General. Cf. *Dep't of Navy v. Egan*, 484 U.S. 518, 527, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) (holding that the denial of security clearance is unreviewable by this court, in part, because it is an "inherently discretionary "decision). Thus, we must only determine whether United States Trustees are excepted from the competitive service by statute. See 5 U.S.C. § 7511(b)(2)(C) (2000).

Prior to 1986, section 581(c) stated that Trustees were "subject to removal for cause by the Attorney General" (emphasis added). In 1986, however, section 581(c) was amended and the "for cause" language was removed. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 111(c), 100 Stat. 3088, 3091 (1986). The amended section now reads: "Each United States trustee is

subject to removal by the Attorney General." Giving effect to section 581(c)'s plain language and its attendant legislative history, it is apparent that the Attorney General need not show cause before removing a Trustee. See *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 145, 154 L. Ed. 2d 610, 123 S. Ct. 720 (2003) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (quoting *Stone v. INS*, 514 U.S. 386, 397, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995))). That Trustees may be removed without cause is a clear indication that they are excepted from the competitive service as required by section 7511(b)(2)(C). See 5 U.S.C. § 7513(a); *McCormick v. Dep't of the Air Force*, 329 F.3d 1354 (Fed. Cir. 2003) (noting that employees in the competitive service may be removed only for cause).

The circumstances of appellants' employment also indicate that they occupied an excepted position. Their personnel forms specifically said that their appointments were excepted pursuant to section 581. And, both were appointed without a competitive examination, which is the "touchstone of the competitive service." *Dodd v. TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985).

Appellants also argue that because they served continuously as Trustees, they were excluded, much like those appointed prior to 1996, from the terms of Reno's order. While appellants did serve continuously, their initial terms ended; they continued in their positions pursuant to section 581(b)[5] merely as holdovers pending reappointment or the appointment of a successor. Once they accepted reappointment, they occupied no different position than any other individual

appointed after Reno's order. Reno's proclamation designating the position of Trustee as confidential and policy-making applies to appellants with full force regardless of their previous status.

Finally, appellants argue that section 581(b) prevents their removal prior to the expiration of their five-year terms. This is not the law, however, because inferior officers may be removed before the end of their statutorily defined term. See *Parsons v. United States*, 167 U.S. 324, 339, 42 L. Ed. 185, 17 S. Ct. 880, 32 Ct. Cl. 626 (1897) ("We must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time ...."); *Pievsky v. Ridge*, 98 F.3d 730, 734 (3d Cir. 1996) ("It is a long-standing rule in the federal courts that a fixed term merely provides a time for the term to end."). Furthermore, reading section 581(b) as mandating a five-year term renders section 581(c) meaningless, a construction we will not adopt. See *Food & Drug Admin. v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 177, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2000) (holding that a statute should not be construed so as to invalidate other parts of the same statute); *Pac Fung Feather Co. v. United States*, 111 F.3d 114, 117 (Fed. Cir. 1997). If Congress had intended to eliminate the removal authority of the Attorney General during the course of the five-year term, it would have deleted section 581(c) in its entirety.

Conclusion

Accordingly, the decision of the Merit Systems Protection Board is affirmed.

AFFIRMED

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 While Stanley and Vergos appealed independently, their cases present identical issues, and we address them in a single disposition.

n2 Section 7701(a) states that "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

n3 Section 7513 states that "(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service. (b) An employee against whom an action is proposed is entitled to--(1) at least 30 days' advance written notice ...; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefore at the earliest practicable date."

n4 Section 7511(a) states that "For the purpose of this subchapter--(1) 'employee' means--...(C) an individual in the excepted service (other than a preference eligible)--(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less."

n5 Section 581(b) states that "Each United States trustee shall be appointed for a term of five years. On the expiration of his term, a United States trustee shall continue to perform the duties of his office until his successor is appointed and qualifies."

DOCKET NUMBER AT-0752-03-0372-I-1

MERIT SYSTEMS PROTECTION BOARD

ELLEN B. VERGOS,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

July 1, 2004

Lisa Krupicka, Esquire, Memphis, Tennessee, for the appellant.

Todd M. Hughes, Esquire, Washington, D.C., for the agency.

OPINION BY: ROBERTS, JR.

OPINION:

BEFORE

Neil A. G. McPhie, Acting Chairman

Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration

earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held

that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).*

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 *(5 U.S.C. § 7703).* You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

Bentley M. Roberts, Jr.

Clerk of the Board

Washington, D.C.

DOCKET NUMBER SF-0752-02-0591-I-1

MERIT SYSTEMS PROTECTION BOARD

LINDA EKSTROM STANLEY,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

March 18, 2004

Howard Moore, Jr., Esquire, Moore and Moore, Oakland, California, for the appellant.

Todd M. Hughes, Esquire, Washington, D.C., for the agency.

OPINION BY: ROBERTS, JR.

OPINION:

BEFORE

Neil A.G. McPhie, Acting Chairman

Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error

interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive

this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).*

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 *(5 U.S.C. § 7703).* [*3] You may read this law as well as review the Board's regulations and other related material at our web site, *http://www.mspb.gov/mspb_library.html.*

FOR THE BOARD:

Bentley M. Roberts, Jr.

Clerk of the Board

Washington, D.C.

04-3298

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LINDA EKSTROM STANLEY,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

November 17, 2005, Decided

November 17, 2005, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION: ORDER

A petition for rehearing en banc having been filed by the PETITIONER, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 25, 2005.

04-3427

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ELLEN B. VERGOS,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

November 17, 2005, Decided

November 17, 2005, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION: ORDER

A petition for rehearing en banc having been filed by the PETITIONER, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 25, 2005.

No. SF-0752-02-0591-I-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

STANLEY, LINDA EKSTRO

VS

DOJ

December 16, 2002

Before: ARNAUDO, PHILIP L., ALJ

Caution! MSPB Initial Decisions are NOT PRECEDENTIAL and cannot be cited as such in submissions to the Board or the Federal Courts.

Howard Moore, Jr., Esquire, Moore and Moore, Oakland, California, for the appellant.

Todd M. Hughes, Esquire, Washington, D.C., for the agency.

BEFORE

Philip L. Arnaudo
Administrative Judge

INITIAL DECISION

On July 31, 2002, the appellant appealed the action of

the Attorney General of the United States that removed her from the position of United States Trustee for Region 17, effective July 2, 2002. *See* Initial Appeal File (IAF), tabs 1 and 7 (agency file), agency exhibits (agxs.) 4A and 4B. For the reasons set forth below, the appeal is DISMISSED for lack of Board appellate jurisdiction.

ANALYSIS AND FINDINGS

Burden of Proof and Applicable Statutory Authority

The Board's jurisdiction is limited, not plenary. *See* 5 U.S.C. § 1204(a)(1). *Cowan v. Department of Agriculture*, 13 M.S.P.R. 196, 198 (1982), *aff'd sub nom. Cowan v. United States*, 710 F.2d 803, 805 (Fed. Cir. 1983). The Board does not have jurisdiction over all matters involving a Federal employee that are allegedly unfair or incorrect. General considerations of fairness do not give the Board authority to adjudicate a claim. *See Dockery v. Federal Deposit Insurance Corporation*, 64 M.S.P.R.458, 462 (1994). Similarly, and specifically at issue in this appeal, the Board does not have jurisdiction over even those adverse actions that are appealable under 5 U.S.C. § 7512, such as a removal, unless the appellant is an 'employee' as defined by 5 U.S.C. § 7511, and thus entitled to appeal to the Board. The appellant has the burden to establish Board jurisdiction. *See* 5 C.F.R. 1201.56(a)(2); *Stern v. Department of the Army*, 699 F.2d 1312, 1314 (Fed. Cir.), *cert. denied*, 462 U.S. 1122 (1983).

In several Orders, the Board advised the appellant of her burden of proof, the specific reasons that this appeal did not appear to be within the Board's appellate

jurisdiction (i.e. the appellant had to show she was an 'employee' within the definition of 5 U.S.C. § 7511), and provided that she could respond by specified dates. *See* IAF, tabs 2, 3, 14, 16 and 19. Each party provided several responses on the issue of jurisdiction.

Title 28 U.S.C. § 581(a) provides that the Attorney General shall appoint one United States trustee for each of the 21 identified regions. Each is appointed for a term of five years and on expiration of this term, the Trustee continues to perform the duties of the office 'until his successor is appointed and qualifies.' 28 U.S.C. § 581(b). Finally, 'Each United States trustee is subject to removal by the Attorney General.' 28 U.S.C. § 581(c).[1]

Title 5 U.S.C. § Chapter 75 (Adverse Actions) includes § 751[1] which defines terms, such as who is 'employee' entitled to appeal identified actions, such as a removal from the federal service. Title 5 U.S.C. § 7511(a) defines such an 'employee' as (1) a non-probationary individual in the 'competitive service,' (2) a preference eligible in the 'excepted service,' and (3) 'an individual in the excepted service (other than a preference eligible)' who has served more than two years of current, continuous service in an Executive agency.[2]

'Executive agencies' include 'executive departments' identified in 5 U.S.C. § 101, including the Department of Justice. 5 U.S.C. § 105. The 'excepted service' includes all federal civil service positions not in the 'competitive service' or the Senior Executive Service.[3] 'Competitive service' is defined in 5 U.S.C. § 2102 and excludes, in pertinent part, positions excepted from competitive service by or under statute. Appointment through

competitive examination system is the 'touchstone' of the competitive service. *See Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985), and 5 C.F.R. § 2.1-2.4.

Jurisdiction

Contentions

The agency moved to dismiss the appeal for lack of Board appellate jurisdiction on the basis that the appellant was not an 'employee' under 5 U.S.C. § 7511 who is entitled to appeal a removal under 5 U.S.C. §§ 7512, 7513 and 7701. The agency maintained that the appellant was not an 'employee,' because at the time of her removal, she occupied a position in the 'excepted service' that the head of the agency, Attorney General Janet Reno, had determined on January 11, 1996, to be a 'confidential, policy-determining, policy-making or policy-advocating character' pursuant to 5 U.S.C. § 7511(b)(2)(C) and 28 U.S.C. § 581(c), before she appointed the appellant to that position on June 26, 1999.

The appellant initially contended that she was improperly removed by the Attorney General on the bases of gender and age (68) discrimination before she had completed her second five-year term that began on June 26, 1999. IAF, tab 1 (i.e., date of birth: 11/14/33). Subsequently, the appellant also contended that she was an 'employee' entitled to appeal to the Board, having served in the position for more than two years, and she could only be removed for 'good cause;' whereas, however, the only reason given for removing her before the end of her five-year term had been

because of a 'change in Presidential administration.' The appellant also argued that the Attorney General's above-noted determination, that the position was a 'confidential, policy-making, policy-determining or policy-advocating' position was 'arbitrary and unreasonable on its face' and contravened the intent of Congress when it established the position. IAF, tab 10.

Background and Preliminary Findings

The Initial Five-Year Term Appointment: June 12, 1994

The dispositive facts are essentially undisputed. By Order signed May 26, 1994, Attorney General Janet Reno appointed the appellant to a five-year term as the United States Trustee for Region 17 (i.e., the Northern and Eastern Districts of California and the District of Nevada) pursuant to 28 U.S.C. § 581 (a) and (b). *See* IAF, tab 9, agx. 4J. This initial appointment was memorialized by a Request for Personnel Action, Standard Form (SF)-52 and a Notification of Personnel Action, SF-50. Review of the SF-52 and SF-50 establishes that the 'Nature of Action' (i.e., block 5B) was an 'Excepted Appointment,' the 'Position Occupied' (i.e., block 34) was in the 'Excepted Service' and the 'Legal Authority' for the appointment (i.e., block 5D) was '28 U.S.C. § 581.' The appointment documents state that the appointment was effective, June 26, 1994. *See* IAF, tab 9, agxs. 4H and 4I. (Emphasis added.)

Declaration of Attorney General 'exempting' United States trustee positions from right to appeal: January 26, 1996

On January 11, 1996, Attorney General Reno issued Order Number 2004-96, entitled 'Exempting United States Trustees from Civil Service Due Process Requirements.' This Order specifically exempted the US Trustee positions, such as the appellant's, from the Civil Service due process requirements, as follows:

By virtue of the authority vested in the Attorney General by law, including 5 U.S.C. § 7511(b)(2)(C) and 28 U.S.C. § 581(c), I hereby determine that the position of the United States Trustee is a position of confidential, policy-determining, policy-making, or policy-advocating character. Accordingly, United States Trustees are exempted from the civil service due process requirements set forth in Title 5 of the Unites States Code.

(Emphasis added. *See* agx. 4G and 4F, at 3)

Appellant's 'Request to be Reappointed': March 2, 1999

On March 2, 1999, approximately two months before the scheduled expiration of her five-year term appointment, the appellant sent a letter to the Director of the Executive Office for the United States Trustees. She pointed out that her current term as Trustee for Region 17 would expire on June 12, 1999, and she 'requested to be reappointed' for another term. *See id.* agx. 4D, at 1. As set forth above, 28 U.S.C. § 581(b) provides that the Trustee's term is five years. The statute also provides that at the expiration of the five-year term, the Trustee continues to perform her duties '... until (her) successor is appointed.' In sum, until another Trustee is appointed to the position, the Trustee whose five-year fixed-term has ended is

permitted to remain in the position indefinitely, unless otherwise removed by the Attorney General pursuant to 28 U.S.C. § 581(c).

Appellant's Re-appointment: June 26, 1999

On June 26, 1999, one month after the end of the appellant's five-year term appointment, Attorney General Reno issued an Order identified as one 'Reappointing Linda Ekstrom Stanley ... .' The Attorney General stated, 'By virtue of the authority vested in me as Attorney General by 28 U.S.C. § 581, I hereby reappoint (appellant) to serve for a term of five years as United States Trustee for Region 17... .' *See id.* agx. 4C. The agency acknowledged that there are no Notifications of Personnel Action documents (e.g., SF-50 or SF-52) that memorialize this 're-appointment.' IAF, tab 16 (Status Conference Order, September 30, 2002).

Appellant's Removal: July 2, 2002

On June 18, 2002, three years after the effective date of her second appointment to the Trustee position, and two years before the expiration of her five-year term, the Attorney General issued an Order removing the appellant as Trustee. The Order states, 'By the authority vested in me as the Attorney General by 28 U.S.C. § 581(c), I hereby remove Linda Ekstrom Stanley as the United States Trustee for Region 17 ... . This Order shall be effective 14 days after the date on which it is signed.' The SF-50 documenting the appellant's termination, effective July 2, 2002, identifies the Legal Authority for the action as the above-referenced Order (i.e., blocks 4, 5B and 5D) and states,

'Reason for Termination,' as follows: 'Termination due to change in Presidential Administration.' (*See* IAF, tab 9, agx. 4B; block 45, 'Remarks'.)

Other Pertinent Notice Documents

Between the appellant's initial appointment as Trustee in 1994 and her second appointment in 1999, the agency issued several statements to the United States Trustees, including the appellant, that both affected and explained Board appeal rights of the US Trustees. First, as noted above, Attorney General Reno issued her January 11, 1996 Order specifically declaring the Trustee position was of 'confidential, policy-determining, policy-making, or policy-advocating character' and also specifically declaring that the Trustee position was 'exempt' from the civil service due process requirements set for in Title 5 United States Code.

Second, on February 1, 1996, the agency's Director, Joseph Patchen, expressly referred to Attorney General Reno's above-cited Order and explicitly informed the Trustees that the agency intended and understood, as a consequence of this determination, that all Trustees appointed AFTER January 11, 1996, when this specific notice was given, were 'exempt' from the provisions of Title 5 of the United States Code. The Director also specifically indicated that this meant the Trustees were exempt from the 'due process protections,' that is, the appeal rights set forth in Title 5. *See id.*, agx. 4F, at 1 and n.1.

Lastly on May 9, 1996, the agency circulated a Memorandum from the General Counsel which

provided a copy of the case of *King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996), decided after Director Patchen's February 1, 1996 Memorandum. The General Counsel also opined that as a result of Circuit's ruling in *Briggs*, all the United States Trustees, who were appointed PRIOR to Attorney General Reno's January 11, 1996 declaration that the position was of a 'confidential' character and exempt from due process requirements were entitled to Board appeal rights in 5 U.S.C. §§ 7511-7513 and 7701. *Id.*, agx. 4E.

Other Specific Findings

At the time of her removal from the position of United States Trustee, the appellant was an appointee in the Excepted Service serving in a position pursuant to a five-year appointment by Attorney General Reno, effective June 26, 1999. This appointment was the appellant's second five-year term, and it was made AFTER Attorney General Reno had declared, and advised the appellant, that the Trustee position was of a 'confidential policy-determining ... character' and exempt from the due process (i.e., notice and appeal) requirements of Title 5 of the United States Code. Attorney General Reno had the authority to make such a determination, pursuant to applicable statutes. Attorney General John Ashcroft removed the appellant, effective July 2, 2002, before the end of the stated term, pursuant to 28 U.S.C. § 581(c). Consequently, the appellant has not shown that she is an 'employee' entitled to appeal her removal to the Board.

A removal from the service is an appealable action that 'employees' defined by 5 U.S.C. § 7511 have a right to

appeal to the Board. The agency did not afford the appellant any appeal rights. The sole remaining question is whether the appellant can establish that she was an 'employee' entitled to appeal to the Board. If she was, the agency removal action is reversible, because it did not provide required notice and appeal right. *See* IAF, tab 16, at 1.

The appellant meets the general definition of an 'employee' as defined by 5 U.S.C. §7511(a)(1)(C)(ii)[4], and she could be entitled to the procedural due process protections of §7513. However, 5 U.S.C. §7511(b)(2)(C) specifically provides that subchapter II, does NOT apply to any employee 'whose position has been determined to be of a confidential, policy-determining, (etc.) character by -(C) ... the head of the agency for a position in the excepted service by statute.'

The answer to the question of whether she was an 'employee' thus depends upon whether the head of the agency, Attorney General Reno had, and properly exercised, the authority to exclude the Trustee position to which the appellant was appointed on June 26, 1999, from appeal rights to the Board, pursuant to 5 U.S.C. § 7511(b)(2)(C) and 28 U.S.C. § 581(c).

All of the appointment documents support the finding that she was in the excepted service, not the competitive service. Further, the appellant's contention that she was a 'Congressional appointee' because she was 'appointed pursuant to an act of Congress which created her position and fixed the length of her tenure' is unsupported by any evidence.[5] The appellant was clearly an employee of a Federal Executive Agency, the Department of Justice. 5 U.S.C. §§ 101 and 105. The

Excepted Service consists of all civil service positions that are not in the competitive service or the Senior Executive Service. 5 U.S.C. § 2103. The appellant has not shown that she was appointed after competitive examination or through such procedures, to the competitive service, rather the Attorney General appointed her to the excepted service for two separate and distinct terms.

The appellant asserted that Attorney General Reno's cited 1996 declaration exempting the Trustee position from appeal rights was made without statutory authority; therefore, it could not exclude the appellant from appeal rights to the Board. Further, she claimed that even assuming without conceding that Attorney General Reno had authority to exempt the Trustee position, her 1996 declaration did not apply to appellant or affect the appellant's appeal rights, because she had been appointed originally in 1994, prior to Attorney General Reno's 1996 declaration. Thus, because she continued without interruption after the expiration of her first term, the appellant claimed that the Attorney General's declaration did not affect her.

I will address the latter contention first. Clearly, the first term ended by statutory provision after five years had elapsed, effective June 12, 1999. The statutory provision is explicit and unequivocal. It states, 'On expiration of (her) term, a United States trustee shall continue to perform the duties of (her) office until a successor is appointed and qualifies.' (Emphasis added.) Thus, the 'expiration' of the appellant's term occurred on June 12, 1999. She remained serving in the Trustee position without being on a 'term' until she was re-appointed to a new five-year term, effective on the date

of the Order, June 26, 1999. This second five-year term was scheduled to end, pursuant to statute on June 25, 2002.

Moreover, the absence of Standard Forms further confirming the appointment does not affect the validity of the appointment or its character. It is the totality of the circumstances that determine whether the appellant was appointed in the civil service. *See Wenk v. Office of Personnel Management*, 21 M.S.P.R. 218, 221 (1984). To meet the requirements for appointment as an employee, the person must have been: (1) appointed to the civil service by a federal official acting in his official capacity; (2) engaged in performance of a federal function under legal or executive authority and (3) supervised by a federal official. *See Simmons v. Department of Agriculture*, 80 M.S.P.R. 380 (1998) and *Scott v. Department of Navy*, 8 M.S.P.R. 282, 285 (1981), *citing National Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 (D.C. Cir. 1981) and *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803). Clearly, the record shows that she met all the cited requirements for a federal appointment when she was appointed to a second term in the Excepted Service pursuant to Attorney General Reno's Order.

In sum, I find that at the time of her removal, the appellant was serving on a second, separate and distinct five-year term commencing June 12, 1999. Further, it is undisputed Attorney General Reno clearly informed the appellant, and all other Trustees serving at the time, January 11, 1994, that she had determined that the position of Trustee, at least from that time forward, was of a 'confidential, policy-determining, policy-making, or policy-advocating character' and excluded

from appeal rights to the Board. In sum, it is beyond dispute that the appellant was informed, and knew, at the time that Attorney General Reno appointed her to a second five-year appointment that she was entering on duty on a Trustee position which the statute said was 'subject to removal by the Attorney General' and which the Attorney General who appointed her specifically told her was both of a 'confidential' character, and 'exempt from the civil service due process requirements' and Board appeal rights.

Therefore, as long as the Attorney General had the authority to exempt the Trustee position to the appellant, the exemption applied to the appellant during her second five-year term. Title 28 U.S.C. § 581(c) provides that the Trustee is 'subject to removal by the Attorney General.' This section does not explicitly state that the position is exempt from appeal rights to the Board. However, I find, for the reasons set forth below, essentially the legislative history of this specific position, the Attorney General was authorized to exempt the position as in 5 U.S.C. § 7511(b)(2)(C).

The record shows that the original version of §581 was enacted as part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)(hereinafter: 1978 Act). It established 10 United States trustee positions covering 18 pilot districts. *See generally In re Schollett*, 980 F.2d 639, 641-42 (10th Cir. 1992). Under the 1978 Act, each Trustee was appointed by the Attorney General for a seven-year term, 'subject to removal for cause by the Attorney General.' Bankruptcy Reform Act of 1978, §224(a), 92 Stat. 2662-63. (Emphasis added.)

In 1986, Congress reworked portions of the Bankruptcy Code and gave the United States Trustee Program a permanent function in the Department of Justice. *See* Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111(a) and 307(b), 100 Stat. 3088, 3090-91, 3126 (1986)(1986 Act). More importantly for our purposes, the 1986 Act changed the length and nature of the United States trustees' tenure by reducing the term from the original seven years to five years, and by striking the language limiting the Attorney General to dismissal of the United States trustees only 'for cause.' *Id.* § 111(d)(2), 100 Stat. 3091.

By expressly and unequivocally deleting the 'for cause' language from the 1978 Act that previously had limited the Attorney General's authority to remove the United States trustees from the procedural protection of 5 U.S.C. Chapter 75, the Congress appeared to have intended to exclude the United States trustees from the protections of 5 U.S.C. § 7511-7513. In this specific context, therefore, this intentional removal of the limiting phrase 'for cause' shows that Congress intended that the Attorney General to have discretion to remove the Trustees without them granting recourse to the appeal processes at 5 U.S.C. Chapter 75.[6] In this context, there is no basis to conclude or to assume that Congress did not intend specifically by its unequivocal action to remove the previous limitation on the Attorney General's authority to remove the Trustees only 'for cause.' Thus, I find that the preponderant evidence shows that the statute gave the Attorney General the authority to remove the Trustee at her discretion. Therefore, the Attorney General, as 'head of the agency' was authorized to make, and did make, the determination that the Trustee position was of a

'confidential, policy-determining, policy-making, or policy-advocating character' and could be exempted from the competitive service and appeal rights. In sum, the appellant was excluded from appealing as an 'employee' on the basis of 5 U.S.C. § 7511(b)(2)(C), and thus precluded from appealing to the Board under that statute.

Thus, the statutory language and history, and the specific determination by Attorney General Reno in 1996, that the Trustee position was 'confidential, policy-determining...' and exempt from due process requirements, before she appointed the appellant to her second, discrete term beginning in 1999, sets this Trustee position apart from those Board cases that appear, at first, to address similar circumstances. However, ultimately these cases are consistent with the result in this appeal. For example, in *Todd v. Merit Systems Protection Board*, 55 F.3d 1574 (Fed. Cir. 1995), the Court concluded that Ms Todd fell within the definition of 'employees' in 5 U.S.C. § 7511(a)(1)(C)(ii) who could appeal to the Board, except, that she was specifically excluded by a provision of the statute under which she was hired, 20 U.S.C. § 241(a) that exempted her employment from appeal protections of 5 U.S.C. § 7511-7513, and §7701.

As noted above, in 1996, the agency's General Counsel discussed the case of *King v. Briggs*, 83 F.3d 1384 (1996), and sought to distinguish the circumstances from those of the Trustee position. In *Briggs*, the Court affirmed the Board's determination[7] that Ms Briggs was an employee for purposes of the Due Process Amendments of 1990, and that the agency had removed her improperly, because it failed to provide appeal

rights to the Board. The Court concluded that the statute under which Ms Briggs was hired, 29 U.S.C. § 783(a)(1) specifically gave the agency the authority to hire an Executive Director 'without regard to the provisions of Title 5 governing appointments in the competitive service or the provision ... of such title relating to classification and General Schedule pay rates.' *Id.* at 1388. Notably absent from these specifically enumerated parts of Title 5 that the agency could disregard were those parts dealing with the appeal rights of Chapters 75 and 77. The Court concluded that Congress gave the agency only the option of disregarding those parts of Title 5 dealing with appointment, pay and classification requirements. Clearly, Congress knew how to exclude specific parts of Title 5, thus, it could have excluded all of Title 5, including appeal rights, but apparently chose not to do so.

In this appeal, in contrast, the Congress did not place any specific limits on the agency's authority to remove the Trustee. It did not specifically identify, as in *Briggs*, that only a portion of Title 5 requirements could be disregarded, thus clearly indicating, as in *Briggs*, that the unidentified parts of Title 5 could not be disregarded.

The case of *Thompson v. Department of Justice*, 61 M.S.P.R. 364 (1994), involves an Individual Right of Action (IRA) appeal filed by a United States trustee who was removed from the agency on January 31, 1991. The Administrative Judge (AJ) dismissed the appeal for lack of jurisdiction on the basis that the Trustee was not an employee because she occupied a 'confidential, policy-determining' etc. position excludable under 5

U.S.C. § 7511(b)(2)(C). *Id.* at 366-67. The Board found, 'The record in this appeal does not indicate whether the appellant's former position was excepted from the competitive service by the President, by OPM, or by statute.' Indeed, the Board concluded, the record did not show, 'that the appropriate official or agency (head) made the determination described in 5 U.S.C. § 7511(b)(2).' The Board found, however, that there was a declaration in the record by the agency head that the appellant 'occupied a high level, confidential position with broad responsibilities for managing the Region and making and advocating policy with regard to bankruptcy issues.' It concluded, nevertheless, 'that declaration, even if otherwise sufficient under 5 U.S.C. § 7511(b)(2), was made too late to affect the appellant's rights under chapter 75.' *Id.* at 368-69. 'A determination under 5 U.S.C. § 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position.' *Citing Briggs*, 60 M.S.P.R. at 335. The Board did not conclude that it had jurisdiction. Instead, it remanded the case for further proceedings and a determination 'whether the Board has jurisdiction over this appeal under chapter 75.' *Id.* at 369.[8]

In the instant appeal, Attorney General Reno, the agency head, made the specific, required determination, word for word as set forth in the statute, and she did it in 1996, several years before the appellant was appointed to the Trustee position in 1999. In sum, the result in *Thompson* is not dispositive of this appeal.

Lastly, a recent case, *Hamlett v. Department of Justice*, 90 M.S.P.R. 674 (2002), addresses the Board appeal rights of an Assistant United States Attorney (AUSA).[9] For reasons set forth in the decision,

including analysis of the Congressional reports and proceedings, the Board distinguished the identified previous cases that held AUSAs did not have appeal rights and could be terminated without an appeal by the Attorney General. *E.g., id.* at 680- 81. Indeed, the Board found '[T]he committee report on the 1990 Amendments suggests that Congress expected 'attorney[s] ... at the Department of Justice' to fall within the revised definition of 'employee' in 5 U.S.C. § 7511.' *Id.* at 681. The factual circumstances in the instant appeal are clearly distinguishable. For example, there is no such evidence of Congressional intent to grant Board appeal rights to Trustees as the Board in *Hamlett* identified. Indeed, as noted above, the evidence is contrary. The Congress specifically deleted and removed a part of the statute that had previously authorized appeal rights for the Trustee position (i.e., that permitted a removal only 'for cause').

The applicable appointing authority, 28 U.S.C. § 541(a) provided that the Attorney General appointed the AUSAs, and §541(b), provided that the AUSA 'is subject to removal by the Attorney General.' *Id.* at 676. The language of this section is nearly identical to that in §581(c). The Board, however, concluded that the statute 'did not bring AUSAs outside of the coverage of 5 U.S.C. § 7511(a)(1)(C), ...' *Id.* at 680. As noted above, however, the section in this statute has a legislative history that plainly showed an intent to exclude the Trustee from appeal rights.

Further, the record does not show that the Board addressed whether the agency head, the Attorney General, ever designated, as in the instant appeal, the AUSA position as a position of 'confidential, policy-

making (etc.) ... character.' It does not appear from the decision that the Attorney General had made the requisite determination under 5 U.S.C. § 7511(b)(2)(C). In this case, the agency head, Attorney General Reno, clearly made the specific determination required by the statute at 5 U.S.C. § 7511(b)(2).

In sum, the determination in *Hamlett* is premised on different factual findings that are not present in the instant appeal and appear to be contrary to those applicable to the Trustee position. Thus, *Hamlett* is distinguishable from the instant case.

Finally, the appellant alleged that the agency engaged in discrimination on the basis of her gender and age. *See* IAF, Tab 1. However, because I have found that the appellant has failed to establish appellate jurisdiction over her appeal, her allegations of discrimination cannot serve as an independent basis for Board jurisdiction. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) *aff'd*, 681 F.2d 867, 871-73 (DC Cir. 1982).

Accordingly, I find that the appellant has failed to meet her burden of establishing Board jurisdiction, and the agency motion to dismiss is granted. *See Stern v. Department of the Army*, 699 F.2d 1312 (Fed. Cir. 1983), *cert. denied*, 462 U.S. 1122 (1983).[10]

DECISION

The appeal is DISMISSED.

FOR THE BOARD

Philip L. Arnaudo
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on January 20, 2003, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

FOOTNOTES

FN1. Duties of the United States trustee (i.e., Trustee) are set forth at 28 U.S.C. § 586. Essentially, the Trustee is the administrator of cases and trustees of cases under designated parts of Title 11 of the United States Code (Bankruptcy). The Trustee chiefly performs administrative duties associated with system of bankruptcy courts, administration and trusteeships.

FN2. Other requirements (i.e., qualifying lengths of service) are not relevant for our purposes. For example, 'preference eligibles' (i.e., essentially specified military service veterans and those with identified relationships to them) are defined in 5 U.S.C. § 2108, but the appellant does not claim such status.

FN3. The Senior Executive Service (SES) consists of positions defined 5U.S.C. § 3132(a)(2). 5 U.S.C. § 2101a. The appellant does not claim, and the record does not show, that she is in the SES.

FN4. As explained within, I find that she is a non-preference eligible in the excepted service who has completed more than 2 years service. Prior to the Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461, excepted service employees, who were not preference eligibles (5 U.S.C. § 2108) did not have such appeal rights.

FN5. (Appellant's Brief) IAF, tab 10 at 3. Of course, by legislation, Congress authorizes executive branch agencies and federal executive branch employees. This does not make them appointees or employees of Congress, the legislative branch. Further, such

employees of Congress are not granted the appeal rights of executive branch federal employees under 5 U.S.C. § Chapter 75.

FN6. The agency has set forth a useful summary of the various iterations of the House and Senate bills and the parts that referred to length of term and 'for cause' as they passed through the legislative process. Briefly, what started out in the 1978 Act as a seven year term, went to a proposed four-year term, before the final, five year term was fixed. Similarly, the limitation of 'removal for cause' in the original House draft of the bill was responded to by the Senate by removal of any 'for cause' limitation and that is the provision of the final Act. See IAF, tab 12, at 7-8, nn. 3 and 4.

FN7. Briggs v. National Council on Disability, 60 M.S.P.R. 331, 333-36 (1994).

FN8. The Board also directed the AJ to consider the applicability of 5U.S.C. § 1221.

FN9. The Board declined to address the appellant's claim that she was entitled to appeal on the basis of 'preference eligible' status. Id. At 681, n.6.

FN10. The appellant is not entitled to the hearing she requested, because such a hearing is warranted only when the appellant makes a non-frivolous claim which would establish Board appellate jurisdiction. See Manning v. MeritSystems Protection Board, 742 F.2d 1424, 1427-1428 (Fed. Cir. 1984).

No. AT-0752-03-0372-I-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE -

VERGOS, ELLEN B

VS

DOJ

June 06, 2003

Before: KLEIN, RICHARD P., ALJ

Caution! MSPB Initial Decisions are NOT PRECEDENTIAL and cannot be cited as such in submissions to the Board or the Federal Courts.

Lisa A. Krupicka, Esquire, Burch, Porter & Johnson, Memphis, Tennessee, for the appellant.

Todd M. Hughes, Esquire, Washington, D.C., for the agency.

BEFORE

Richard P. Klein
Administrative Judge

INITIAL DECISION

INTRODUCTION

On February 18, 2003, the appellant appealed to the Board from the agency's action removing her from the position of United States Trustee, Memphis, Tennessee, effective January 21, 2003. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction. And, because there was no factual dispute bearing on the jurisdictional issue, the hearing that the appellant requested was not held. *See Manning v. Merit Systems Protection* Board, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

JURISDICTION

The Board's jurisdiction is not plenary because it is limited to those areas specifically granted by law, rule, or regulation. 5 U.S.C. § 7701(a); *Cowan v. United States*, 710 F.2d 803, 805 (Fed. Cir. 1983). And it is the appellant who has the burden of proving by preponderant evidence that the matter she seeks to appeal is within the Board's appellate jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i). Thus, the burden is on the appellant to show that she was an 'employee' entitled to appeal her removal to the Board.

UNDISPUTED FACTS

The appellant was initially appointed to a 5-year term as a United States Trustee for Region 8 (Kentucky and Tennessee) by Attorney General Janet Reno in an order dated October 31, 1994. *See* Agency File, Tab 4I. This was an appointment in the excepted service, made

under the authority of 28 U.S.C. § 581, and was effective on January 8, 1995. *Id.* at Tabs 4G and 4H.

On January 11, 1996, Attorney General Reno signed an Order stating that the Trustee position was 'a position of confidential, policy-determining, policy-making, or policy-advocating character.' *Id.* at Tab 4I. The appellant's 5-year term was to expire in early January 2000; however, she remained in the position in a 'holdover capacity' until she was appointed for a second term of 5 years by Attorney General Reno on February 19, 2000. *See* 28 U.S.C. § 581(b); Agency File, Tab 4b. Thereafter, in an Order dated January 15, 2003, Attorney General John Ashcroft, who succeeded Attorney General Reno, 'removed' the appellant from the position of United States Trustee effective upon the date her successor took office. *Id.* at Tab 4a.

CONCLUSIONS OF LAW

At the time of her termination, the appellant was a non-preference eligible in the excepted service who had completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. *See* 5 U.S.C. § 7511(a)(1)(C)(ii). However, she had no appeal rights under Title 5 of the United States Code because she encumbered a position that (1) the head of her agency (Janet Reno), prior to her second, 5-year appointment, 'determined to be of a confidential, policy-determining, policy-making or policy-advocating character' and (2) was 'excepted from the competitive service by statute.' 5 U.S.C. §§ 7511(b)(2)(C).[1]

With respect to the second provision, I find that the statute excepting the appellant from the competitive was 28 U.S.C. § 581. The original version of this statute provided for the appointment of trustees by the Attorney General for a 7-year term during which the incumbent was 'subject to removal for cause' by that same individual. *See* Bankruptcy Reform Act of 1978, Pub. L .No. 95-598, 92 Stat. 2662-63 (1978). Subsequently, Congress reduced the term of these trustees from 7 to 5 years and struck the language that limited the Attorney General from dismissing a trustee except for cause. *See* Bankruptcy Reform Act of 1986, Pub. L. No. 99-554, 100 Stat. 3091 (1986). Thus, 28 U.S.C. § 581(c) now reads that '[E]ach United States trustee is subject to removal by the Attorney General.'

The appellant's most compelling argument is that she was placed in the excepted service pursuant to regulation and not by statute. In this regard, she cites the Board's decision in *Hamlett v. Department of Justice*, 90 M.S.P.R. 674, 680 (2002). In *Hamlett*, the Board found that an Assistant United States Attorney (AUSA), who meets the plain terms of 5 U.S.C. § 7511(a)(1)(C), is not precluded by 28 U.S.C. § 542 from appealing an adverse action covered by 5 U.S.C. § 7512 to the Board. And, 28 U.S.C. § 542(b) provides that any AUSA 'is subject to removal by the Attorney General'--language that is identical to the language in 28 U.S.C. § 581(c) as set forth in the previous paragraph. However, the distinguishing factor between the 2 provisions is that, unlike 28 U.S.C. § 581(c), there is no indication that 28 U.S.C. § 542 previously contained language requiring 'cause' before an AUSA could be removed. Thus, in order to give meaning to Congress' 1986 decision to remove the 'cause' requirement in 28 U.S.C.

§ 581(c) for trustees, it is necessary to conclude that 'cause' was no longer required in the removal of any trustee.

In this regard, I also note that, when 28 U.S.C. § 581(c) was changed in 1986, non-preference eligibles in the excepted service, such as the appellant, had no appeal rights to the Board because the 1990 Due Process Amendments, which expanded the appeal rights of excepted service employees, had not been passed. Nevertheless, the 1986 changes did affect those trustees who were preference eligibles with 1 year of current continuous service in the same or similar position who previously had appeal rights.

The appellant also argues that, by striking the language that a trustee could only be removed for cause, Congress intended that the 5-year term of a trustee was now mandatory--not that the trustee could be removed without cause. In other words, no trustee could be terminated before his/her 5-year term ended. Such an argument is frivolous at best. For, if this interpretation of the statute were correct, a trustee could remain in office even if he/she never reported for work, regularly attempted to perform the duties of the position while intoxicated, engaged in felonious conduct, or committed any other removable offense.

In view of the above, I find that the appellant has failed to establish by a preponderance of the evidence that the Board has jurisdiction over her removal.

DECISION

The appeal is DISMISSED.

FOR THE BOARD

Richard P. Klein
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on January 20, 2003, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

FOOTNOTES

FN1. If the determination that the appellant's position was confidential, policy-determining, policy-making, or policy-advocating had been made during her second 5-year appointment, she would have prevailed in this case. See *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 368-69 (1994). For, '[A] determination under the 5 U.S.C. § 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position. Id. at p. 369.

DUE PROCESS AMENDMENTS OF 1990, 5 U.S.C. §§7511-7514

→§ 7511. Definitions; application

(a) For the purpose of this subchapter--

(1) "employee" means--
(A) an individual in the competitive service--
(i) who is not serving a probationary or trial period under an initial appointment; or
(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
(i) in an Executive agency; or
(ii) in the United States Postal Service or Postal Rate Commission; and
(C) an individual in the excepted service (other than a preference eligible)--
(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;
(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;
(3) "grade" means a level of classification under a position classification system;
(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an

employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee--

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by--

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence

component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

5 USC 7512 (1990 DUE PROCESS AMENDMENTS)

ACTIONS COVERED

This subchapter applies to--

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this

title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

5 USC 7513. CAUSE AND PROCEDURE (1990 DUE PROCESS AMENDMENTS)

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to--

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the

answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 USC 7514. REGULATIONS (1990 DUE PROCESS AMENDMENTS)

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

5 USC 7701. APPELLATE PROCEDURES (MERIT SYSTEMS PROTECTION BOARD)

(a) An employee, or applicant for employment, may

submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

****

5 USC 7703. JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this

subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this

section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

****

28 USC 581-589b, UNITED STATES TRUSTEES

→28 USC 581. UNITED STATES TRUSTEES

(a) The Attorney General shall appoint one United States trustee for each of the following regions composed of Federal judicial districts (without regard to section 451):

(1) The judicial districts established for the States of Maine, Massachusetts, New Hampshire, and Rhode Island.
(2) The judicial districts established for the States of Connecticut, New York, and Vermont.
(3) The judicial districts established for the States of Delaware, New Jersey, and Pennsylvania.
(4) The judicial districts established for the States of Maryland, North Carolina, South Carolina, Virginia, and West Virginia and for the District of Columbia.
(5) The judicial districts established for the States of Louisiana and Mississippi.
(6) The Northern District of Texas and the Eastern District of Texas.
(7) The Southern District of Texas and the Western District of Texas.
(8) The judicial districts established for the States of Kentucky and Tennessee.

(9) The judicial districts established for the States of Michigan and Ohio.
(10) The Central District of Illinois and the Southern District of Illinois; and the judicial districts established for the State of Indiana.
(11) The Northern District of Illinois; and the judicial districts established for the State of Wisconsin.
(12) The judicial districts established for the States of Minnesota, Iowa, North Dakota, and South Dakota.
(13) The judicial districts established for the States of Arkansas, Nebraska, and Missouri.
(14) The District of Arizona.
(15) The Southern District of California; and the judicial districts established for the State of Hawaii, and for Guam and the Commonwealth of the Northern Mariana Islands.
(16) The Central District of California.
(17) The Eastern District of California and the Northern District of California; and the judicial district established for the State of Nevada.
(18) The judicial districts established for the States of Alaska, Idaho (exclusive of Yellowstone National Park), Montana (exclusive of Yellowstone National Park), Oregon, and Washington.
(19) The judicial districts established for the States of Colorado, Utah, and Wyoming (including those portions of Yellowstone National Park situated in the States of Montana and Idaho).
(20) The judicial districts established for the States of Kansas, New Mexico, and Oklahoma.
(21) The judicial districts established for the States of Alabama, Florida, and Georgia and for the Commonwealth of Puerto Rico and the Virgin Islands of the United States.

(b) Each United States trustee shall be appointed for a term of five years. On the expiration of his term, a United States trustee shall continue to perform the duties of his office until his successor is appointed and qualifies.
(c) Each United States trustee is subject to removal by the Attorney General.

28 USC 582. ASSISTANT UNITED STATES TRUSTEES

(a) The Attorney General may appoint one or more assistant United States trustees in any region when the public interest so requires.
(b) Each assistant United States trustee is subject to removal by the Attorney General.

➡28 USE 586. DUTIES; SUPERVISION BY ATTORNEY GENERAL

(a) Each United States trustee, within the region for which such United States trustee is appointed, shall--
(1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;
(2) serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;
(3) supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate--
(A)(i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the

United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and

(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application. [FN1]

(B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;

(C) monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under sections 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans;

(D) taking such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;

(E) monitoring creditors' committees appointed under title 11;

(F) notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;

(G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee

deems to be appropriate to prevent undue delay in such progress;

(H) in small business cases (as defined in section 101 of title 11), performing the additional duties specified in title 11 pertaining to such cases; and

(I) monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications;

(4) deposit or invest under section 345 of title 11 money received as trustee in cases under title 11;

(5) perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe;

(6) make such reports as the Attorney General directs;

7) in each of such small business cases--

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall--

(i) begin to investigate the debtor's viability;

(ii) inquire about the debtor's business plan;

(iii) explain the debtor's obligations to file monthly operating reports and other required reports;

(iv) attempt to develop an agreed scheduling order; and

(v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state of the debtor's books and records, and verify that the debtor has filed its tax

returns; and

(C) review and monitor diligently the debtor's activities, to identify as promptly as possible whether the debtor will be unable to confirm a plan; and

(8) in any case in which the United States trustee finds material grounds for any relief under section 1112 of title 11, the United States trustee shall apply promptly after making that finding to the court for relief.

(b) If the number of cases under chapter 12 or 13 of title 11 commenced in a particular region so warrants, the United States trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States trustees to serve in cases under such chapter. The United States trustee for such region shall supervise any such individual appointed as standing trustee in the performance of the duties of standing trustee.

(c) Each United States trustee shall be under the general supervision of the Attorney General, who shall provide general coordination and assistance to the United States trustees.

(d)(1) The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11. The Attorney General may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.

(2) A trustee whose appointment under subsection (a)(1) or under subsection (b) is terminated or who ceases to be assigned to cases filed under title 11, United States Code, may obtain judicial review of the final agency decision by commencing an action in the district court of the United States for the district for which the panel to which the trustee is appointed under subsection (a)(1), or in the district court of the United States for the district in which the trustee is appointed under subsection (b) resides, after first exhausting all available administrative remedies, which if the trustee so elects, shall also include an administrative hearing on the record. Unless the trustee elects to have an administrative hearing on the record, the trustee shall be deemed to have exhausted all administrative remedies for purposes of this paragraph if the agency fails to make a final agency decision within 90 days after the trustee requests administrative remedies. The Attorney General shall prescribe procedures to implement this paragraph. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based on the administrative record before the agency.

(e)(1) The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11, shall fix--

(A) a maximum annual compensation for such individual consisting of--

(i) an amount not to exceed the highest annual rate of basic pay in effect for level V of the Executive Schedule; and

(ii) the cash value of employment benefits

comparable to the employment benefits provided by the United States to individuals who are employed by the United States at the same rate of basic pay to perform similar services during the same period of time; and

(B) a percentage fee not to exceed--

(i) in the case of a debtor who is not a family farmer, ten percent; or

(ii) in the case of a debtor who is a family farmer, the sum of--

I) not to exceed ten percent of the payments made under the plan of such debtor, with respect to payments in an aggregate amount not to exceed $450,000; and

(II) three percent of payments made under the plan of such debtor, with respect to payments made after the aggregate amount of payments made under the plan exceeds $450,000;

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

(2) Such individual shall collect such percentage fee from all payments received by such individual under plans in the cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee. Such individual shall pay to the United States trustee, and the United States trustee shall deposit in the United States Trustee System Fund--

(A) any amount by which the actual compensation of such individual exceeds 5 per centum upon all payments received under plans in cases under chapter 12 or 13 of title 11 for which such individual serves as standing trustee; and

(B) any amount by which the percentage for all such cases exceeds--

(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of paragraph (1); plus

(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases. Subject to the approval of the Attorney General, any or all of the interest earned from the deposit of payments under plans by such individual may be utilized to pay actual, necessary expenses without regard to the percentage limitation contained in subparagraph (d)(1)(B) of this section.

(3) After first exhausting all available administrative remedies, an individual appointed under subsection (b) may obtain judicial review of final agency action to deny a claim of actual, necessary expenses under this subsection by commencing an action in the district court of the United States for the district where the individual resides. The decision of the agency shall be affirmed by the district court unless it is unreasonable and without cause based upon the administrative record before the agency.

(4) The Attorney General shall prescribe procedures to implement this subsection.

28 USC 589. STAFF AND OTHER EMPLOYEES

The United States trustee may employ staff and other employees on approval of the Attorney General.

Former version of 589

Pub.L. 99-554, Title I, § 114(b), Oct. 27, 1986, 100 Stat.

3093, provided that: "During the period beginning on the effective date of this Act [see section 302 of Pub.L. 99-554, as amended, set out as a note under section 581 of this title], and ending on October 1, 1989, the provisions of title 5 of the United States Code [Title 5, Government Organization and Employees] governing appointments in the competitive service shall not apply with respect to appointments under section 589 of title 28, United States Code [this section]."

5 USC 2101. CIVIL SERVICE; ARMED FORCES; UNIFORMED SERVICES

For the purpose of this title--

(1) the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services;
(2) "armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard; and
(3) "uniformed services" means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

5 USC 2102. THE COMPETITIVE SERVICE

(a) The "competitive service" consists of--

(1) all civil service positions in the executive branch, except--

(A) positions which are specifically excepted from the competitive service by or under statute;

(B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; and

(C) positions in the Senior Executive Service;

(2) civil service positions not in the executive branch which are specifically included in the competitive service by statute; and

(3) positions in the government of the District of Columbia which are specifically included in the competitive service by statute.

(b) Notwithstanding subsection (a)(1)(B) of this section, the "competitive service" includes positions to which appointments are made by nomination for confirmation by the Senate when specifically included therein by statute.

(c) As used in other Acts of Congress, "classified civil service" or "classified service" means the "competitive service".

5 USC 2103. THE EXCEPTED SERVICE

(a) For the purpose of this title, the "excepted service" consists of those civil service positions which are not in the competitive service or the Senior Executive Service.

(b) As used in other Acts of Congress, "unclassified civil service" or "unclassified service" means the "excepted service".

28 USC 542. ASSISTANT UNITED STATES ATTORNEYS

(a) The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.

(b) Each assistant United States attorney is subject to removal by the Attorney General.

28 USC 536. POSITIONS IN EXCEPTED SERVICE (FBI)

All positions in the Federal Bureau of Investigation are excepted from the competitive service, and the incumbents of such positions occupy positions in the excepted service.

28 USC 594. AUTHORITY AND DUTIES OF AN INDEPENDENT COUNSEL

(c) Additional personnel.--For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). *The positions of all such employees are exempted from the competitive service.* Such employees shall be

compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia under sections 548 and 550, but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level ES-4 of the Senior Executive Service Schedule under section 5382 of title 5, as adjusted for the District of Columbia under section 5304 of that title regardless of the locality in which an employee is employed.
(emphasis added).

29 USC 783(a). STAFF OF NATIONAL COUNCIL ON DISABILITIESEXECUTIVE DIRECTOR; TECHNICAL AND PROFESSIONAL EMPLOYEES

(1) The Chairperson of the National Council may appoint and remove, without regard to the provisions of Title 5 governing appointments, the provisions of chapter 75 [5 U.S.C.A. § 7501 et seq.] of such title (relating to adverse actions), the provisions of chapter 77 [5 U.S.C.A. § 7701 et seq.] of such title (relating to appeals), or the provisions of chapter 51 [5 U.S.C.A. § 5101 et seq.] and subchapter III [5 U.S.C.A. § 5331 et seq.] of chapter 53 of such title (relating to classification and General Schedule pay rates), an Executive Director to assist the National Council to carry out its duties. The Executive Director shall be appointed from among individuals who are experienced in the planning or operation of programs for individuals with disabilities.